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JOSEPH CORSIGLIA et al.,
Complainants below,

v.

MADELENE M. BROWN et al.,
Defendants below.

CHARLES L. McPARTLIN,
petitioner,
Appellant,

v.

NORMAN ASHER,
respondent,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

295 I.A. 611

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Charles L. McPartlin, intervening petitioner in a foreclosure proceeding pending in the circuit court, appeals from an order of the chancellor requiring the receiver to pay to Norman Asher, grantee of the owner of the equity, a sum representing the net rentals during the interval of some ~~twenty-eight~~ 28 months between the end of the period of redemption and the issuance of the master's deed.

From the stipulated facts it appears that December 3, 1929, a second mortgage foreclosure proceeding, entitled Corsiglia v. Brown, was filed in the circuit court as case No. B-193280, and a receiver was appointed therein. Subsequently, February 10, 1931, a first mortgage foreclosure suit involving the same property, entitled Curda v. Brown, was instituted in the same court as case No. B-215117. August

295 I.A. 61

MR. JUSTICE JUSTICE PRIMROSE
DELIVERED THE OPINION OF THE COURT.

Charles L. Mortellin, intervening petitioner in a foreclosure proceeding pending in the circuit court, appeals from an order of the chancellor requiring the receiver to pay to Norman Asher, grantee of the owner of the equity, a sum representing the net rentals during the interval of some twenty-eight months between the end of the period of redemption and the issuance of the master's deed.

From the stipulated facts it appears that December 3, 1929, a second mortgage foreclosure proceeding, entitled Mortellin v. Brown, was filed in the circuit court as case No. S-103280, and a receiver was appointed therein. Subsequently, February 10, 1931, a first mortgage foreclosure suit involving the same property, entitled Asher v. Brown, was instituted in the same court as case No. E-21317. August

17, 1931, the receivership was extended to the first mortgage foreclosure proceeding for the benefit of the complainant therein, and under the extending order the receiver was directed to pay to complainant a sum in excess of $2,500 to apply on the deficiency decree entered in the second mortgage suit. March 25, 1931, the premises were sold pursuant to a decree entered in the second mortgage foreclosure case, and on June 25, 1931, Hattie A. Dyerstadt, owner of the equity of redemption, conveyed all her right, title and interest in the premises to Norman Asher. No redemption was made from this sale, and December 29, 1932, a master's deed issued to Asher.

January 18, 1933, the property was sold to A. J. Olsen, under a decree of foreclosure and sale entered in the first mortgage case. This decree provided that if a deficiency resulted from the sale the receiver should remain in possession for a period of ~~fifteen~~ 15 months after sale. The sale left a deficiency in the sum of $32,302.38, for which a decree was duly entered against Edward C. Brown and Madelene M. Brown, the mortgagors. The period of redemption from the sale held in the first mortgage foreclosure suit expired April 18, 1934. Charles L. McPartlin is the grantee in the master's deed issued in the first mortgage foreclosure suit, and the owner and holder of $32,302.38 deficiency decree. Although the period of redemption expired April 18, 1934, the master's deed did not issue to McPartlin, for some reason not explained in the record, until August 28, 1936, some ~~twenty-eight~~ 28 months having intervened between the end of the period of redemption and the issuance of the master's deed.

The final account of Metropolitan Trust Company, receiver of the premises, showed that it had on hand $2,688.04, together with two notes aggregating $250. Of this amount $1,950 and the two notes represent the net income received from the premises from April 18, 1934, the date upon which the period of redemption expired under the

17, 1931, the receivership was extended to the first mortgage foreclosure proceeding for the benefit of the complainant therein, and under the extending order the receiver was directed to pay to complainant a sum in excess of $[illegible] to apply on the deficiency decree entered in the second mortgage suit. March 28, 1931, the premises were duly purchased in a decree entered in the second mortgage foreclosure case, and on June 20, 1931, Philip A. Jeffreys, owner of the equity of redemption, conveyed all his rights, title and interest in the premises to Norman Asher. No redemption was made from this sale, and December 18, 1932, a master's deed issued to Asher.

January 18, 1937, the property was sold to [illegible]. Green, under a decree of foreclosure and sale entered in the first mortgage case. This decree provided that if a deficiency resulted from the sale the receiver should remain in possession for a period of fifteen months after sale. The sale left a deficiency in the sum of $[illegible], for which a decree was duly entered against Edward G. Brown and Madeline K. Brown, the mortgagors. The period of redemption from the sale held in the first mortgage foreclosure suit expired April 18, 1938. Martin E. Martelin is the grantee in the master's deed issued in the first mortgage foreclosure suit, and the owner and holder of $[illegible] deficiency decree. Although the period of redemption expired April 18, 1938, the master's deed did not issue to Martelin, for some reason not explained in the record, until August [illegible], 1939, some twenty-eight months having intervened between the end of the period of redemption and the issuance of the master's deed.

The final account of Metropolitan Trust Company, receiver of the premises, showed that it had on hand $[illegible], together with two notes aggregating $[illegible]. Of this amount $[illegible] and the two notes represent the net income received from the premises from April 18, 1938, the date upon which the period of redemption expired under the

first mortgage foreclosure sale, to August 28, 1936, the date on which the master's deed issued to McPartlin.

Pursuant to the filing of the receiver's final report and account, McPartlin, September 4, 1936, filed an intervening petition in the junior mortgage foreclosure proceeding, requesting that possession of the premises be delivered to him and praying that the funds held by the receiver be paid to his order. Norman Asher, grantee of the equity of redemption and holder of the master's deed under the second mortgage foreclosure suit, filed an answer to McPartlin's petition, claiming the net rents collected from April 18, 1934, to August 28, 1936. Upon hearing of the petition and answer an order was entered by the chancellor awarding the net rentals to Asher, and from this order McPartlin appeals.

Upon these facts the question arises whether the owner of the equity of redemption is entitled to the rentals during the interval between the end of the period of redemption and the issuance of the master's deed, where a receiver is in possession, as against the holder of the master's deed and owner of the deficiency decree.

The law is well settled in this state that a decree of foreclosure and sale, followed by a sale, merges all the rights and liabilities under the trust deed into the decree, and extinguishes the lien of the trust deed. It was so held in the early and leading case of Lightcap v. Bradley, 186 Ill. 510, wherein the court, in discussing this phase of the case said (p. 524-5 525):

"The cause of action was merged in that foreclosure and sale, and all the rights and liabilities growing out of the trust deed were transferred to the decree. When a mortgage is foreclosed by suit the decree of the court becomes the basis of the title. ***. The debt was merged in the decree, and the rights and liabilities growing out of the trust deed were fixed by such decree and to be enforced through its provisions. ***"

This rule was followed in the later case of Schaeppi v. Bartholomae, 217 Ill. 105.

Under the prevailing theory of mortgages in this state the

first mortgage foreclosure sale, to August 23, 1936, the date on which the master's deed issued to McPartlin.

Pursuant to the filing of the receiver's final report and account, McPartlin, September 4, 1936, filed an intervening petition in the junior mortgage foreclosure proceeding, requesting that possession of the premises be delivered to him and praying that the funds held by the receiver be paid to him order. Norman Asher, grantee of the equity of redemption and holder of the master's deed under the second mortgage foreclosure suit, filed an answer to McPartlin's petition, claiming the net rents collected from April 18, 1934, to August 23, 1936. Upon hearing of the petition and answer an order was entered by the chancellor awarding the net rentals to Asher, and from this order McPartlin appeals.

Upon these facts the question arises whether the owner of the equity of redemption is entitled to the rentals during the interval between the end of the period of redemption and the issuance of the master's deed, where a receiver is in possession, as against the holder of the master's deed and owner of the deficiency decree.

The law is well settled in this state that a decree of foreclosure and sale, followed by a sale, merges all the rights and liabilities under the trust deed into the decree, and extinguishes the lien of the trust deed. It was so held in the early and leading case of Lightner v. Bradley, 186 Ill. 110, wherein the court, in discussing this phase of the case said (p. 324-5):

"The cause of action was merged in that foreclosure and sale, and all the rights and liabilities growing out of the trust deed were transferred to the decree. When a mortgage is foreclosed by suit the decree of the court becomes the basis of the title. The debt was merged in the decree, and the rights and liabilities growing out of the trust deed were fixed by such decree and to be enforced thereon in its provisions."

This rule was followed in the later case of Schaeppi v. Bartholomew, 217 Ill. 108.

Under the prevailing theory of mortgages in this state the

trust deed conveys only a qualified title. The mortgagor parts with title only as security to his creditor and during the existence of his debt or obligation. This rule was likewise laid down in Lightcap v. Bradley, supra, wherein the court said (p. 522-3):

"The mortgagee is the legal owner for only one purpose, while at the same time, the mortgagor is the owner for every other purpose *** when the debt is gone, the incident, the mortgage, is also gone."

In another part of the same opinion the court said (p. 525):

"The title which Johnson (the trustee) had was only available for the collection of the notes, and they were merged in the decree ***. Whether the doctrine of merger applies or not, the sale of the premises under the decree exhausted all the rights and remedies under the trust deed, and the title which had been in the trustee was sold by the court."

It has been further held that although the title of the mortgagee is extinguished by the sale, if a deficiency results he still has the right to have a receiver appointed for the sequestration of the income. This right is usually based upon provisions of the mortgage pledging the rents and profits as additional security for the debt (Shinnick v. Goodman, 259 Ill. App. 107; First National Bank v. Illinois Steel Co., 174 Ill. 140), and upon the theory that a deficiency results from the sale against an insolvent equity owner, coupled with an inadequacy of security (Owsley v. Neeves, 179 Ill. App. 61). Where the mortgage contains such provisions, the decree of foreclosure and sale usually reserves jurisdiction in the court to satisfy the deficiency out of the rents, issues and profits, by continuance of the receivership during the period of redemption. In the instant case the decree provides that the court shall retain jurisdiction for the purpose of satisfying any deficiency that may result from the sale by continuance of the receivership through the full ~~fifteen~~ 15-month period of redemption.

However, where there is no pledge of the rents and profits and no deficiency decree against the owner of the equity of redemption results, the mortgagee, after sale, no longer has an interest in the

trust deed conveys only a qualified title. The mortgagor parts with title only as security to his creditor and during the existence of his debt or obligation. This rule was likewise laid down in Lindsay v. Bradley, supra, wherein the court said (p. 628-9):

> "The mortgagee is the legal owner for only one purpose, while at the same time, the mortgagor is the owner for every other purpose and when the debt is gone, the incident, the mortgage, is also gone."

In another part of the same opinion the court said (p. 629):

> "The title which Johnson (the mortgagee) had was only available for the collection of the notes, and they were merged in the decree. Neither the doctrine of merger applies or not, the sale of the premises under the decree cleared all the rights and remedies under the trust deed, and the title which had been in the trustee was sold by the court."

It has been further held that although the title of the mortgagee is extinguished by the sale, if a deficiency results he still has the right to have a receiver appointed for the sequestration of the income. This right is usually based upon provisions of the mortgage pledging the rents and profits as additional security for the debt. (Hinnelk v. Goodman, 205 Ill. App. 107; First National Bank v. Illinois Steel Co., 174 Ill. 160), and upon the theory that a deficiency results from the sale against an insolvent equity owner, coupled with an inadequacy of security (Kelly v. Levy, 174 Ill. App. 61). Here the mortgage contains such provisions, the decree of foreclosure and sale usually reserves jurisdiction in the court to satisfy the deficiency out of the rents, issues and profits, by continuance of the receivership during the period of redemption. In the instant case the decree provides that the court shall retain jurisdiction for the purpose of satisfying any deficiency that may result from the sale by continuance of the receivership through the full fifteen month period of redemption.

However, where there is no pledge of the rents and profits and no deficiency decree against the owner of the equity of redemption results, the mortgagee, after sale, no longer has an interest in the

premises and the owner of the equity is entitled to the possession and to the rents and profits thereof until the master's deed issues. (Coleman v. Mulcahey, 334 Ill. 64.)

The law is likewise well settled that the owner of the equity of redemption has the same estate, including the right to possession and to the income of the property, both before and after the foreclosure sale, subject only to the qualification that where a deficiency exists the mortgagee may, under the provisions of the decree, if the decree contains such provisions, secure the appointment of a receiver during the period of redemption or so much thereof as may be necessary to collect the deficiency. (Lightcap v. Bradley, 186 Ill. 510; Bradley v. Lightcap, 202 Ill. 154; Chicago Joint Stock Land Bank v. McCambridge, 343 Ill. 456.) In the last mentioned case the court in discussing this rule of law said (p. 460):

> "A sale under a decree of foreclosure of a mortgage extinguishes the mortgage and satisfies the debt secured by it to the extent of the purchase price received. It does not, however, convey the title, which remains in the mortgagor or his grantee until the expiration of the fifteen months' period of redemption and until a conveyance by the master's deed."

In Aetna Life Insurance Co. v. Beckman, 210 Ill. 394, it was held that the owner of the equity has the same estate that he had prior to the decree of foreclosure, and it has been frequently held that prior to the foreclosure decree and sale the owner of the equity has the right to possession and to the income of the property unless the rents are sequestered by the appointment of a receiver, for good cause shown. It would therefore follow that if he had the right to the income prior to the sale he ought to have the same right subsequent thereto, and it was so held in Shinnick v. Goodman, 259 Ill. App. 107, 114; Standish v. Musgrove, 223 Ill. 500. In Schaeppi v. Bartholomae, 217 Ill. 105, the court stated it to be the general rule that the owner of the equity of redemption is entitled to the rents and profits of the premises until the expiration of the period

premises and the owner of the equity is entitled to the possession and to the rents and profits thereof until the master's deed issues. (Coleman v. Muldoney, 334 Ill. 64.)

The law is likewise well settled that the owner of the equity of redemption has the same estate, including the right to possession and to the income of the property, both before and after the foreclosure sale, subject only to the qualification that where a deficiency exists the mortgagee may, under the provisions of the decree, if the decree contains such provisions, secure the appointment of a receiver during the period of redemption or in which thereof as may be necessary to collect the deficiency. (Hubbard v. Bradley, 186 Ill. 510; Bradley v. Hubbard, 202 Ill. 154; Chicago Joint Stock Land Bank v. McCambridge, 343 Ill. 456.) In the last mentioned case the court in discussing this rule of law said (p. 460):

"A sale under a decree of foreclosure of a mortgage within which the mortgagee and satisfies the debt secured by it to the extent of the purchase price received. It does not, however, convey the title, which remains in the mortgagor or his grantee until the expiration of the fifteen months' period and until a conveyance by the master's deed."

In Aetna Life Insurance Co. v. Beckman, 310 Ill. 394, it was held that the owner of the equity has the same estate that he had prior to the decree of foreclosure, and it has been frequently held that prior to the foreclosure decree and sale the owner of the equity has the right to possession and to the income of the property unless the rents are sequestered by the appointment of a receiver, for good cause shown. It would therefore follow that if he had the right to the income prior to the sale he ought to have the same right subsequent thereto, and it was so held in Whitwich v. Goodman, 359 Ill. 102, 114; Standish v. Musgrove, 282 Ill. 300. In Schaeppi v. Bartholomae, 217 Ill. 105, the court stated it to be the general rule that the owner of the equity of redemption is entitled to the rents and profits of the premises until the expiration of the period

of redemption. The only qualification of this rule is the right of the mortgagee to subject the rents to the payment of a deficiency through the appointment of a receiver, and if such a deficiency is satisfied prior to the expiration of the period of redemption the owner of the equity of redemption is entitled to the remainder of the rents until the period of redemption expires. And if the purchaser at the foreclosure sale fails to take out a deed within the time required by law, the legal title remains in the mortgagor or his grantee, notwithstanding he fails to redeem. (Bradley v. Lightcap, 202 Ill. 154.)

Asher's counsel invoke the rule that the purchaser at the foreclosure sale, through the certificate of purchase, acquired neither title to the land nor right to possession and to the income thereof until such time as a master's deed was issued to him; that his only interest as purchaser was to receive the amount of his purchase money, in case of redemption, or to receive a deed after ~~fifteen~~ 15 months if no redemption was made. This rule is supported by numerous Illinois decisions. It was held in Williams v. Williston, 315 Ill. 178; Aetna Life Ins. Co. v. Beckman, 210 Ill. 394; Lightcap v. Bradley, 186 Ill. 510, and Allison v. White, 285 Ill. 311, that the purchaser at a foreclosure sale, by virtue of the certificate of purchase issued to him by the master, acquired neither title nor right to the possession of the premises, but merely acquired the statutory right to receive the amount of the purchase money stated in the certificate together with any taxes or other liens paid by him, in the event of a redemption, and, where no redemption is made, the right to receive a deed from the master upon the expiration of the period of redemption. The rule is well stated in Williams v. Williston, 315 Ill. 178, as follows (pp. 183-~~4~~ 184):

"The purchaser of land at a master's sale pursuant to a decree of foreclosure is not by his purchase or the certificate of sale issued to him vested with the title to the land, but acquires the right to receive the redemption money if redemption is made within the time and in the manner prescribed by the statute, or in case no redemption is so

of redemption. The only qualification of this rule is the right of the mortgagee to subject the rents to the payment of a deficiency through the appointment of a receiver, and if such a deficiency is satisfied prior to the expiration of the period of redemption the owner of the equity of redemption is entitled to the remainder of the rents until the period of redemption expires. And if the purchaser at the foreclosure sale fails to take out a deed within the time required by law, the legal title remains in the mortgagor or his grantee, notwithstanding his failure to redeem. (Bradley v. Lightner, 102 Ill. 164.)

Author's counsel invokes the rule that the purchaser at the foreclosure sale, through the certificate of purchase, acquired neither title to the land nor right to possession and to the income thereof until such time as a master's deed was issued to him; that his only interest as purchaser was to receive the amount of his purchase money, in case of redemption, or to receive a deed after fifteen months if no redemption was made. This rule is supported by numerous Illinois decisions. It was held in Hillman v. Hillman, 318 Ill. 178; Aetna Life Ins. Co. v. Beckman, 310 Ill. 394; Hinchcliff v. Bradley, 186 Ill. 620, and Hilson v. Kite, 285 Ill. 311, that the purchaser at a foreclosure sale, by virtue of the certificate of purchase issued to him by the master, acquired neither title nor right to the possession of the premises, but merely acquired the statutory right to receive the amount of the purchase money stated in the certificate together with any taxes or other items paid by him, in the event of a redemption, and where no redemption is made, the right to receive a deed from the master upon the expiration of the period of redemption. The rule is well stated in Hillman v. Hillman, 318 Ill. 178, as follows (p. 183-4):

"The purchaser of land at a master's sale pursuant to a decree of foreclosure is not by his purchase or the certificate of sale issued to him invested with the title to the land, but requires the right to receive the redemption money if redemption is made within the time and in the manner prescribed by the statute, or in case no redemption is so

made within that period, then to receive a master's deed. (Sutherland v. Long, 273 Ill. 309.) A master's certificate of sale does not purport to convey title but describes the premises purchased, the amount paid therefor and the time when the purchaser will be entitled to a deed if no redemption is made. (Smith's Stat. 1923, ch. 77, sec. 16; Lightcap v. Bradley, 186 Ill. 510; Allison v. White, 285 Ill. 311.) Both before and after the sale under a foreclosure decree the owner of the equity of redemption has the same estate in the land. (Lightcap v. Bradley, 186 Ill. 510; Bradley v. Lightcap, 202 Ill. 154; Aetna Life Insurance Co. v. Beckman, 210 Ill. 394.)"

Counsel for petitioner argues that upon the running of the period of redemption the title of the equity owner is absolutely gone, but we do not understand this to be the rule. The question arose in Lightcap v. Bradley, 186 Ill. 510, where the court said (p. 532):

"After the expiration of the period of redemption the title of the mortgagor would be absolutely gone, in the sense that the purchaser had become absolutely entitled to a conveyance of it, and in this sense it has often been said that his title is gone, but it is never actually out of him until a conveyance is made. The purchaser cannot oust him from possession or call for an account of rents and profits without a deed, and the certificate of purchase could never change from a lien into title to the land until a deed is made. The mortgagor's right is gone if the purchaser complies with the statute and avails himself of the right to a conveyance of the title. By the decree and by the statute the title of the mortgagor and those claiming under him would only be divested and the legal title vested in the defendant upon the execution of a deed."

It was argued in Bradley v. Lightcap, 202 Ill. 154, that the right of the owner of the equity expired with the period of redemption, and that thereafter he had no title. But in discussing this proposition the court said (p. 164):

"If the title of Prettyman passed out of him (equity owner) at the expiration of the period of redemption it must have gone somewhere. It was not in nubibus, and it did not go to the complainant or any other person. The certificate of purchase conveyed no title to the complainant (purchaser)."

Therefore, if it be true that the owner of the equity of redemption retains legal title until a deed is issued to the purchaser, it must follow that the owner of the equity has title for all beneficial purposes, including the right to possession and to the income of the property, and it was so held in Bradley v. Lightcap, 202 Ill. 154, where the court said (p. 165):

"The title must remain in the original owner until it passes

made within that period, then so long as a mortgagee, (Mitchell v. Lunn, 275 Ill. 539,) a mortgagee certificate of sale does not purport to convey title but describes the premises purchased, the amount paid therefor and the time when the purchaser will be entitled to a deed if no redemption is made. (Smith v. Ins. Co. 172 Ill. 22; Lightner v. Bradley, 102 Ill. 210; Lilienn v. Wright, 275 Ill. 31.) [illegible] after the sale under a foreclosure decree the owner of the equity of redemption has the same estate in the land. (Lightner v. Bradley, 102 Ill. 210; Bradley v. Lightner, 203 Ill. 184; Peoples Life Insurance Co. v. Bodman, 210 Ill. 77.)"

Counsel for petitioner argues that upon the running of the period of redemption the title of the equity owner is absolutely gone, but we do not understand this to be the rule. The question arose in Lightner v. Bradley, 102 Ill. 210, where the court said (p. 224):

"After the expiration of the period of redemption the title of the mortgagor would be absolutely gone, in the sense that the purchaser had become absolutely entitled to a conveyance of it, and in this sense it has often been said that his title is gone, but it is never actually out of him until a conveyance is made. The purchaser cannot oust him from possession or call for an account of rents and profits without a deed, and the certificate of purchase could never change from a lien into title to the land until a deed is made. The mortgagor's right is gone if the purchaser complies with the statute and by his act of the right to a conveyance of the title. By the decree and by the mere sale the title of the mortgagee and those claiming under him could only be divested and the legal title vested in the defendant upon the execution of a deed."

It was argued in Bradley v. Lightner, 203 Ill. 184, that the right of the owner of the equity expired with the period of redemption, and that thereafter he had no title. But in discussing this proposition the court said (p. 184):

"If the title of Pettyman passed out of him (equity owner) at the expiration of the period of redemption it must have gone somewhere. It was not in mortgagee, and it did not go to the complainant or any other person. The certificate of purchase conveyed no title to the complainant (purchaser)."

Therefore, if it be true that the owner of the equity of redemption retains legal title until a deed is issued to the purchaser, it must follow that the owner of the equity has title for all beneficial purposes, including the right to possession and to the income of the property, and it was so held in Bradley v. Lightner, 203 Ill. 184, where the court said (p. 185):

"The title must remain in the original owner until it passes

out of him by the execution of a deed; and this is a title for all beneficial purposes."

Of similar purport are Chicago Joint Stock Land Bank v. McCambridge, 343 Ill. 456; Allison v. White, 285 Ill. 311, and other cases cited in respondent's brief.

Asher's counsel rely upon the recent case of Chicago Joint Stock Land Bank v. McCambridge, 343 Ill. 456, as decisive of the question here presented. A bill was there filed to foreclose a first mortgage trust deed and a cross-bill to foreclose a second mortgage on a farm. Previous to the entry of the decree a receiver was appointed to collect and enforce payment of rents on the farm during the pendency of the action. The land was sold under decree July 14, 1928, to the land bank for the full amount of its debt, interest and costs, and the sale was reported to the court the same day and approved. The period of redemption expired August 14, 1929, but the receiver was allowed by leave of court to enter into a lease expiring February 28, 1930. The master's deed issued October 24, 1929. The purchaser at the sale claimed all crops growing on the land at the time of the expiration of the period of redemption. From the receiver's report, filed January 13, 1930, it appeared that he had on hand 706 bushels of oats in a bin on the premises, received as his share-rent of the oats for 1929, and had also on hand one-half of the corn raised on ~~ninety-eight~~ 98 acres of the premises as his share-rent of the corn for 1929, which was fully matured before October 14, 1929, but only a portion of which had been picked and husked before October 28, 1929, though all the corn had been picked and husked and was in a crib on the premises when the report was filed. Under objections filed by the land bank to the receiver's report, the bank contended that upon receiving the deed to the premises after the expiration of the period of redemption, it became the owner of the land, including the corn

out of him by the execution of a deed; and this is a title for all beneficial purposes.'

Of similar purport are Jones v. Joint Stock Land Bank v. McCambridge, 343 Ill. 456; Allison v. Nite, 258 Ill. 311, and other cases cited in respondent's brief.

Labor's counsel rely upon the recent case of Ohio Joint Stock Land Bank v. McCambridge, 343 Ill. 456, as decisive of the question here presented. A bill was there filed to foreclose a first mortgage trust deed and a cross-bill to foreclose a second mortgage on a farm. Previous to the entry of the decree a receiver was appointed to collect and enforce payment of rents on the farm during the pendency of the action. The land was sold under decree July 14, 1932, to the land bank for the full amount of its debt, interest and costs, and the sale was reported to the court the same day and approved. The period of redemption expired August 14, 1932, but the receiver was allowed by leave of court to enter into a lease expiring February 28, 1930. The master's deed issued October 24, 1932. The purchaser at the sale claimed all crops growing on the land at the time of the expiration of the period of redemption. From the receiver's report, filed January 13, 1930, it appeared that he had on hand 708 bushels of oats in a bin on the premises, received as his share-rent of the oats for 1929, and had also on hand one-half of the corn raised on ninety-eight acres of the premises as his share-rent of the corn for 1929, which was fully matured before October 14, 1932, but only a portion of which had been picked and husked before October 28, 1932, though all the corn had been picked and husked and was in a crib on the premises when the report was filed. Under objections filed by the land bank to the receiver's report, the bank contended that upon receiving the deed to the premises after the expiration of the period of redemption, it became the owner of the land, including the corn

grown upon it and still not severed from it; that the rights of the tenant under the lease expired with the destruction of his landlord's title by the conveyance of the land, which conveyed not only the land itself but the unharvested crop of corn still standing on it and not severed from the soil. The court laid down the general rule of common law that growing crops form a part of the real estate to which they are attached, and follow the title thereto, and that a purchaser who has acquired title to the land through a sale upon a decree of foreclosure is therefore entitled to the growing crop sown after the execution of the mortgage and not harvested before the purchaser acquires title to the land, and then reaffirmed the doctrine that a sale under a decree of foreclosure of a mortgage extinguishes the mortgage and satisfies the debt secured by it to the extent of the purchase price received, but that title "remains in the mortgagor or his grantee until the expiration of the fifteen months of redemption and until a conveyance by the master's deed," citing Bradley v. Lightcap, 202 Ill. 154; Schroeder v. Bozarth, 224 Ill. 310. Further discussing the question in controversy the court said (p. 461):

"Both before and after a sale under a foreclosure decree the owner of the equity of redemption has the same estate in the land. (Williams v. Williston, 315 Ill. 178; Aetna Life Ins. Co. v. Beckman, 210 id. 394.) The only qualification of his estate is that the amount and time of the redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time. (Stephens v. Illinois Mutual Ins. Co., 43 Ill. 327.) Until the conveyance by the master the mortgagor or his grantee is entitled to the possession and use of the premises to the same extent as before the sale and may convey them as he chooses, but upon such conveyance by the master the grantee becomes vested with the complete title to the land, with all houses, barns, fences and improvements of every kind erected on or attached to the land, including all crops growing or grown, matured or unmatured, and not severed from the land. ***

"The master's deed is dated October 24, 1929, but it was not recorded until October 28. The presumption, in the absence of evidence to the contrary, is that it was delivered on the day of its date. The evidence shows that thirty bushels of the corn had been gathered before that date but that all of the corn raised on the premises except thirty bushels was severed from the soil and placed in cribs after October 24, 1929, and this corn is the property of the

grown upon it and still not severed from it; that the rights of the tenant under the lease expired with the destruction of his landlord's title by the conveyance of the land, which conveyed not only the land itself but the unharvested crop of corn still standing on it and not severed from the soil. The court laid down the general rule of common law that growing crops form a part of the real estate to which they are attached, and follow the title thereto, and that a purchaser who has acquired title to the land through a sale upon a decree of foreclosure is therefore entitled to the growing crop even after the execution of the mortgage and not harvested before the purchaser acquires title to the land, and then reaffirmed the doctrine that a sale under a decree of foreclosure of a mortgage extinguishes the mortgage and satisfies the debt secured by it to the extent of the purchase price received, but that title "remains in the mortgagor or his grantee until the expiration of the fifteen months of redemption and until a conveyance by the master's deed," citing Bradley v. Ai Moore, 2 Ill. App. 104; Schroeder v. Bonnell, 224 Ill. 310. Further discussing the question in controversy the court said (p. 481):

> "Both before and after a sale under a foreclosure decree the owner of the equity of redemption has the same estate in the land. (Hilliard v. Hilliard, 232 Ill. 17; Peters Life Ins. Co. v. Bradley, 210 id. 394.) The only qualification of his estate is that the mortgagee of the redemption have been absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time. (Stephens v. Illinois Central R. Co., 43 Ill. 327.) Until the conveyance by the master the mortgagor or his grantee is entitled to the possession and use of the premises to the same extent as before the sale and may convey them as he chooses, but upon such conveyance by the master the grantee becomes vested with the complete title to the land, with all houses, barns, fences and improvements of every kind erected on or attached to the land, including all crops growing or grown, matured or unmatured, and not severed from the land. ***

> "The master's deed is dated October 24, 1912, but it was not recorded until October 28. The presumption, in the absence of evidence to the contrary, is that it was delivered on the day of its date. The evidence shows that thirty bushels of the corn had been gathered before that date but that all of the corn raised on the premises except thirty bushels was severed from the soil and placed in cribs after October 24, 1912, and that corn is the property of the

plaintiff in error.

"The judgment of the Appellate Court and the decree of the circuit court are reversed and the cause is remanded to the circuit court, with directions to enter a decree finding the plaintiff in error entitled to all the corn grown on the land except the thirty bushels gathered prior to the delivery of the master's deed to it, ordering its delivery to him and settling the receiver's accounts in conformity with this finding."

In principle that case is precisely applicable to the instant proceeding, for it was there held that the Land Bank, the purchaser at the foreclosure sale, had no claim upon the crops gathered prior to the delivery of the master's deed. The evidence in that case disclosed that ~~thirty~~ 30 bushels of the corn had been gathered before the master's deed was issued, and the Supreme court held that all the corn raised on the premises except the ~~thirty~~ 30 bushels severed from the soil and placed in cribs before October 24, 1929, the date on which the deed issued, belonged to the Land Bank, the purchaser at the sale and the grantee in the master's deed.

Petitioner's counsel rely on Donohue v. Central Life Insurance Company, 283 Ill. App. 254, wherein it was held that the failure of the purchaser to obtain a deed "is a mere irregularity" which equity will overlook. However, there were special equities in that case which impelled the court to reach that conclusion. It was there argued that the owner of the equity, by his failure to assert any interest in the property and by allowing it to be held adversely to him by the receiver, was estopped from claiming any interest in the income collected by the receiver from the period of redemption to the time of the issuance of the deed. It appears from the opinion in that case, however, that the purchaser was in actual possession and was receiving the income from his own tenant. In the proceeding before us the person in possession was a disinterested party acting as the officer of the court, and it has been long and consistently held that the possession of a receiver and his receipt of the rents and profits from

plaintiff in error.

"The judgment of the appellate court and the order of the circuit court are reversed and the cause is remanded to the circuit court, with direction to enter a decree finding the plaintiff in error entitled to all the corn grown on the land except the thirty bushels reserved prior to the delivery of the testator's deed to it, containing the delivery to him and holding the receiver's accounts in conformity with this finding."

A principle that case is precisely applicable to the instant proceeding, for it was there held that the land bank, the purchaser at the foreclosure sale, had no claim upon the crops retained prior to the delivery of the mortgagor's deed. The evidence in that case disclosed that thirty bushels of the corn had been preserved before the mortgagor's deed was issued, and the Supreme Court held that all the corn raised on the premises except the thirty bushels severed from the soil and placed in cribs before October 14, 1932, the date on which the deed issued, belonged to the Land Bank, the purchaser at the sale and the grantee in the mortgagor's deed.

Petitioner's counsel rely on Gordon v. Central Life Insurance Company, 273 Ill. App. 224, wherein it was held that the failure of the purchaser to obtain a deed "is a mere irregularity" which equity will overlook. However, there were special equities in that case which impelled the court to reach that conclusion. It was there argued that the owner of the equity, by his failure to assert an interest in the property and by allowing it to be held adversely to him by the receiver, was estopped from claiming any interest in the income collected by the receiver from the period of redemption to the time of the issuance of the deed. It appears from the opinion in that case, however, that the purchaser was in actual possession and was receiving the income from his own tenant. In the proceeding before us the person in possession was a disinterested party holding at the officer of the court, and it has been long and constantly held that the possession of a receiver has the benefit of the rights and profits from

the property, is for the benefit of the person entitled to it. (Davis v. Dale, 150 Ill. 239.)

Petitioner's counsel argues that it would be inequitable to deprive his client of the rents collected between the expiration of the period of redemption and the issuance of the deed. The record does not disclose why ~~twenty-eight~~ 28 months were allowed to lapse before a deed was obtained from the master, and in the absence of any explanation it is fair to conclude that petitioner merely slept on his rights. He would have been entitled to his deed April 18, 1934. His failure to obtain it must be attributed to his own neglect, in the absence of any other explanation, which under the well settled rules laid down by the decisions cited herein, will not deprive respondent of the rights which the law gives him.

We are of the opinion that the chancellor properly required the receiver to pay the sum of $1,950, together with the two mortgage notes aggregating $250, representing the net income collected by the receiver, to Asher, and the order is therefore affirmed.

ORDER AFFIRMED.

Scanlan and John J. Sullivan, JJ., concur.

the property, is for the benefit of the person entitled to it.
(Davis v. Davis, 150 Ill. 229.)

Petitioner's counsel argues that it would be inequitable to deprive his client of the rents collected between the expiration of the period of redemption and the issuance of the deed. The record does not disclose why twenty-eight months were allowed to lapse before a deed was obtained from the master, and in the absence of any explanation it is fair to conclude that petitioner merely slept on his rights. He would have been entitled to his deed April 18, 1934. His failure to obtain it must be attributed to his own neglect, in the absence of any other explanation, which under the well settled rules laid down by the decisions cited herein, will not deprive respondent of the rights which the law gives him.

We are of the opinion that the chancellor properly required the receiver to pay the sum of $1,950, together with the two mortgage notes aggregating $250, representing the net income collected by the receiver, to Kuhn, and the order is therefore affirmed.

ORDER AFFIRMED.

Scanlan and Griffin, JJ., concur.

39944

MINNIE HIATT,
Appellee,

vs.

CUMMINGS SAVINGS & LOAN ASSOCIATION, a Corporation, and ALFRED H. MOYER,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

295 I.A. 611

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her complaint alleging that she had been defrauded by defendant Cummings Savings & Loan Association, P. H. Cummings, Jr., and Alfred H. Moyer, its officers and agents; she asked for an accounting; the matter was referred to a master in chancery who reported favorably for plaintiff but recommended that the complaint be dismissed as to Cummings and Moyer; on exceptions to the report the court affirmed it except as to the recommendation that the complaint be dismissed as to Moyer; the decree was entered finding there was due plaintiff from defendant association and Moyer $2122.56, with costs of the reference. The two defendants appeal.

Plaintiff's complaint alleged that in October, 1924, at the solicitation of defendant Moyer, she and her husband, Charles Jacobs, since deceased, made payments of money at intervals to the association; that the moneys were given to Moyer, neither plaintiff nor her husband receiving any receipt, stock or other memorandum evidencing such payments; that two accounts of these payments were opened by the association, - one called Book 128 and the other Book 139.

Charles Jacobs, husband of plaintiff, died March 20, 1929, leaving plaintiff surviving as sole legatee, entitled to all moneys paid into the association. (Plaintiff is now married to a Mr. Hiatt.) The complaint charges that through various manipulations moneys were charged to plaintiff's accounts which were withdrawn by Moyer and of which she knew nothing and received no part; that subsequently, in

39944

ELMER E. HIATT, Appellee,	
vs.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
CUMMINGS SAVINGS & LOAN ASSOCIATION, a Corporation, and ALFRED K. BOYER, Appellants.	

295 I.A. 611

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her complaint alleging that she had been defrauded by defendant Cummings Savings & Loan Association, K. A. Cummings, Jr., and Alfred K. Boyer, its officers and agents; she asked for an accounting; the matter was referred to a master in chancery who reported favorably for plaintiff but recommended that the complaint be dismissed as to Cummings and Boyer; on exceptions to the report the court sustained it except as to the recommendation that the complaint be dismissed as to Boyer; the decree was entered finding there was due plaintiff from defendant association and Boyer $2122.50, with costs of the reference. The two defendants appeal.

Plaintiff's complaint alleged that in October, 1924, at the solicitation of defendant Boyer, she and her husband, Charles Jacobs, since deceased, made payments of money at intervals to the association; that the moneys were given to Boyer, neither plaintiff nor her husband receiving any receipt, stock or other memorandum evidencing such payments; that two accounts of these payments were opened by the association, - one called book 125 and the other book 139.

Charles Jacobs, husband of plaintiff, died March 30, 1928, leaving plaintiff surviving as sole legatee, entitled to all moneys paid into the association. (Plaintiff is now married to a Mr. Hiatt.) The complaint charges that through various manipulations moneys were charged to plaintiff's accounts which were withdrawn by Boyer and of which she knew nothing and received no part; that subsequently, in

October, 1931, after plaintiff had made repeated attempts to ascertain the amount of money in her accounts and had requested payment of such credits she was informed by Moyer and Cummings that Charles Jacobs in his lifetime had entered into a contract to purchase real estate, and if plaintiff would endorse and redeliver a check of the association for $535.74 payable to her, and also pay the balance due of $21, title to this real estate would be conveyed to her.

Plaintiff charges that the signatures of her husband and herself on the notes and checks which operated to withdraw moneys from her accounts were forged by Moyer, that the alleged real estate contract was not signed by Jacobs and his signature was a forgery; that plaintiff, relying on the representations of Cummings and Moyer, having been on friendly terms with the latter for many years and believing that the spurious contract was a valid charge on moneys due plaintiff from the association, did as they requested - endorsed and redelivered the check of the association for $535.74, and executed her check for $21 to pay the balance due on the contract and delivered them to Moyer and Cummings.

Plaintiff also alleged that she subsequently learned that the real estate was encumbered with a trust deed, and that no deed or title has ever been delivered to or accepted by plaintiff for this real estate. Plaintiff charges that defendants conspired to defraud her of her moneys in the association and by fraud procured her assent to assume the alleged contract for the purchase of real estate.

The major part of defendants' brief and argument in this court is that the report of the master and the decree are both manifestly contrary to the weight of the evidence.

The testimony before the master was voluminous, with a large number of exhibits. It is impossible to narrate all of it within any reasonable compass.

October, 1931, after plaintiff had made repeated attempts to ascertain the amount of money in her accounts and had requested payment of such credits she was informed by Boyer and Dunning that Jacobs in his lifetime had entered into a contract to purchase real estate, and if plaintiff would endorse and redeliver a check of the association for $[illegible].74 payable to her, and also pay the balance due of $[illegible], title to this real estate would be conveyed to her.

Plaintiff charges that the signature of her husband and herself on the notes and checks which operated to withdraw moneys from her accounts were forged by Boyer, that the alleged real estate contract was not signed by Jacobs and his signature was a forgery; that plaintiff, relying on the representations of Dunning and Boyer, having been on friendly terms with the latter for many years and believing that the spurious contract was a valid charge on moneys due plaintiff from the association, did as they requested - endorsed and redelivered the check of the association for $[illegible].74, and executed her check for $[illegible] to pay the balance due on the contract and delivered them to Boyer and Dunning.

Plaintiff also alleges that she subsequently learned that the real estate was encumbered with a trust deed, and that no deed or title has ever been delivered to or accepted by plaintiff for this real estate. Plaintiff charges that defendants conspired to defraud her of her moneys in the association and by fraud procured her assent to execute the alleged contract for the purchase of real estate.

The major part of defendants' brief and argument in this court is that the report of the master and the decree are both manifestly contrary to the weight of the evidence.

The testimony before the master was voluminous, with a large number of exhibits. It is impossible to narrate all of it within any reasonable compass.

The master found that Moyer was an officer of the association and solicited plaintiff and her then husband, Charles Jacobs, to make payments of money into the association; that from October, 1924, until February, 1931, plaintiff made regular payments into the association but received no receipt or memorandum evidencing the payments; that two accounts were kept of plaintiff's money, one called Book 128, the other Book 139.

That on January 10, 1929, a loan of $250 was charged against the account known as Book 128 and that a promissory note for this amount, bearing the namesof Charles and Minnie Jacobs as makers, was in the possession of defendants; that a check of the association was drawn for $237.50, payable to Charles and Minnie Jacobs, which was cashed at a bank; also a check for $250, payable to the order of Minnie Jacobs, which bears her endorsement, was paid. Plaintiff denied that it was her genuine signature on any of these papers, and a handwriting expert testified that the alleged signatures of Charles and Minnie Jacobs on these papers were forgeries. There is no contradictory testimony as to this matter except the disclaimer of Moyer.

The master found that these signatures were forgeries and that neither plaintiff nor her husband had authorized the loan or received any of the money represented by it.

The master also found that under date of May 15, 1928, a loan of $660 was charged against plaintiff's book account No. 139, and checks and notes similar to the transaction just described were in possession of defendants. The master found that the signatures of plaintiff and her husband in connection with the alleged loan of $660 were forgeries, and that neither plaintiff nor her husband ever received any of the amount of the alleged loan.

The master found that after the death of her husband on March 20, 1929, plaintiff made repeated inquiries of Moyer as to

The master found that Boyer was an officer of the association and solicited plaintiff and her husband, Charles Jacobs, to make payments of money into the association; that from October, 1924, until February, 1927, plaintiff made regular payments into the association but received no receipt or memorandum evidencing the payments; that two sets were kept of plaintiff's money, one called Book 128, the other Book 130.

That on January 10, 1927, a loan of $200 was charged against the account known as Book 128 and that a promissory note for this amount, bearing the names of Charles and Minnie Jacobs as makers, was in the possession of defendants; that a check of the association was drawn for $177.50, payable to Charles and Minnie Jacobs, which was cashed at a bank; also a check for $19.50, payable to the order of Minnie Jacobs, which bears her endorsement, was paid. Plaintiff denies that it was her genuine signature on any of these papers, and a handwriting expert testified that the alleged signatures of Charles and Minnie Jacobs on these papers were forgeries. There is no contradictory testimony as to this matter except the testimony of Boyer.

The master found that these signatures were forgeries and that neither plaintiff nor her husband authorized the loan or received any of the money represented by it.

The master also found that under date of May 15, 1926, a loan of $500 was charged against plaintiff's book account No. 130, and checks and notes similar to the transaction just described were in possession of defendants. The master found that the signatures of plaintiff and her husband in connection with the alleged loan of $500 were forgeries, and that neither plaintiff nor her husband ever received any of the amount of the alleged loan.

The master found that after the death of her husband on March 20, 1930, plaintiff made repeated inquiries of Boyer as to

when she could obtain the moneys she had paid into the association and was told by him she could not obtain any money at that time. Subsequently Moyer delivered to plaintiff a check of the defendant association for $174.31 and told her this was all he could get for her just then. Plaintiff insisted she was entitled to a greater sum.

In October, 1931, defendants Cummings and Moyer had an interview with plaintiff with reference to settling the dispute relative to the amount due plaintiff from the association. Defendants exhibited to her a contract for a warranty deed to real estate purporting to bear the signature of Charles Jacobs, her deceased husband; they told plaintiff that her husband had made payments on the contract which she would lose unless she paid the balance due. Pursuant to these representations plaintiff endorsed and redelivered a check of the association for $535.74 payable to her, and delivered to Cummings her check for $21. The master found that no deed was delivered to plaintiff conveying the real estate described in the contract, and that the purported signature of Charles Jacobs to the contract was a forgery.

The master found that plaintiff had known Moyer for over twenty years prior to commencing these proceedings; that Moyer and his wife were intimate friends of Charles and Minnie Jacobs, and that by reason of this long and intimate friendship plaintiff relied upon Moyer in all her transactions with defendant association; that Moyer occupied a fiduciary relationship toward plaintiff; that she did not understand the status of her accounts with the association, and that by reason of her reliance on Moyer was persuaded that the only way she could obtain the moneys she had paid into her accounts over a long period of years was by doing what they asked her to do with reference to the contract for real estate purported to

when she could obtain the money she had paid into the association and was told by him she could not obtain any money at that time. Subsequently Joyce delivered to plaintiff a check of the defendant association for $174.31 and told her this was all he could get for her just then. Plaintiff insists she was entitled to a greater sum.

In October, 1931, defendants Dunlap and Joyce had an interview with plaintiff with reference to settling the dispute relative to the amount due plaintiff from the association. Defendants exhibited to her a contract for a warranty deed to real estate purporting to bear the signature of Charles Jacobs, her deceased husband; they told plaintiff that her husband had made payments on the contract which she would lose unless she paid the balance due. Pursuant to these representations plaintiff endorsed and delivered a check of the association for $[illegible] payable to her, and delivered to Dunlap her check for $[illegible]. The master found that no deed was delivered to plaintiff conveying the real estate described in the contract, and that the purported signature of Charles Jacobs to the contract was a forgery.

The master found that plaintiff had known Joyce for over twenty years prior to commencing these proceedings; that Joyce and his wife were intimate friends of Charles and Minnie Jacobs, and that by reason of this long and intimate friendship in plaintiff relied upon Joyce in all her transactions with defendant association; that Joyce occupied a fiduciary relationship toward plaintiff; that he did not understand the status of her accounts with the association, and that by reason of her reliance on Joyce she persuaded that the only way she could obtain the money she had paid into her accounts over a long period of years was by doing what they asked her to do with reference to the contract for real estate purported to

be signed by her husband.

Defendants' counsel allege various seeming contradictions and inconsistencies in the testimony adduced by plaintiff. We do not deem them of great importance. Moreover, the master, who saw the witnesses and heard them testify, had a better opportunity than we have to pass upon the credibility of their testimony. A master's report is entitled to due weight. Pasedach v. Auw, 364 Ill. 491.

The testimony of the handwriting expert was uncontradicted, and upon oral argument counsel for defendants admitted that some of the documents in the case had been forged.

Defendants say the master received in evidence an incompetent document purporting to be a police report. Moyer had testified that he had an interview with plaintiff on April 13, 1931, in the office of the association and that a check for the balance of account No. 128 was made out and handed to plaintiff and endorsed in his presence in the office of the association on that date - April 13th. To rebut this plaintiff testified that on April 12, 1931, while Moyer was driving with plaintiff and others in an automobile, it collided with two other cars and plaintiff was injured and taken in an ambulance to Billings hospital where she stayed for about a week. To support her testimony as to the date of the accident a police officer testified that their records show the report of an accident occurring April 12, 1931, to a Ford coupe driven by Alfred Moyer. This evidence was competent. And in addition another witness testified as to the date of the accident. The testimony as to the time of the automobile accident tended to disprove the testimony of Moyer that certain things happened on April 13th in the office of the association.

Defendants' argument that when plaintiff paid the balance due on the real estate contract and accepted the statement that

be signed by her husband.

Defendants' counsel allege various seeming contradictions and inconsistencies in the testimony adduced by plaintiff. We do not deem them of great importance. Moreover, the master, who saw the witnesses and heard them testify, had a better opportunity than we have to pass upon the credibility of their testimony. A master's report is entitled to due weight. Freedman v. Ayer, 304 Ill. 491.

The testimony of the handwriting expert was contradicted, and upon oral argument counsel for defendants admitted that some of the documents in the case had been typed.

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Defendants' argument that when plaintiff paid the balance due on the real estate contract and accepted the statement that

her husband had made payments on this contract which were charged to their accounts in the association, plaintiff ratified all that had gone before. This argument cannot prevail. As we have said, the evidence shows complete reliance on Moyer with reference to her business with the association. She trusted him implicitly, and when the real estate contract purporting to bear her dead husband's signature was presented to her, she accepted it and the statements with reference to payments thereon as the truth, especially when made by Moyer whom she considered for many years a reliable friend. Moyer, an officer of the association, was in a fiduciary relationship to plaintiff, and under such circumstances no action by her, induced by him, can be considered a ratification.

It is well settled that ratification must be made with full knowledge of all the facts affecting the rights of the ratifier. Addis v. Grange, 358 Ill. 127. In Mors v. Peterson, 261 Ill. 532, 536, the court said:

> "When a confidential or fiduciary relation is established between parties, courts of equity scrutinize very closely any transaction or contract between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence. All transactions between parties in this relation are presumptively fraudulent and void, and before a court of equity will permit such contract to stand, the proof must be clear and convincing and satisfy the conscience of the chancellor that good faith has been exercised and that the confidence reposed in the beneficiary of the contract has not been betrayed by him."

The report of the master was fully justified by the evidence presented. The chancellor properly approved it, except as to the recommendation that the complaint be dismissed as to Moyer. The chancellor properly included Moyer in the decree as personally liable for the amount found due.

We see no convincing reason to disagree with the decree and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

her husband and made payments on this contract which were credited to their accounts in the association, plaintiff ratified all that had gone before. This argument cannot prevail. As we have said, the evidence shows count's testimony to be false with reference to her business with the association. She treated the liability, and when the real estate contract purporting to bear her husband's signature was presented to her, she accepted it and the statements in reference to payments thereon as the truth, especially when made by lawyer who had demanded for and yield a reliable friend. Moreover, an officer of the association, was in a fiduciary relationship to plaintiff, and under such circumstances no action by her, induced by him, can be considered a ratification.

It is well settled that ratification must be made with full knowledge of all the facts affecting the rights of the ratifier. Abbie v. Grants, 266 Ill. 177. In Moore v. Peterson, 251 Ill. 266, 266, the court said:

"When a confidential or fiduciary relation is established between parties, courts of equity scrutinize very closely any transaction or contract between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence. All transactions between parties in this relation are presumptively fraudulent and void, and before a court of equity will permit such contract to stand, the proof must be clear and convincing and satisfy the conscience of the chancellor that good faith has been observed and that the confidence reposed in the beneficiary of the contract has not been betrayed to him."

The report of the master was fully justified by the evidence presented. The chancellor properly approved it, except as to the recommendation that the complaint be dismissed as to lawyer. The chancellor properly included lawyer in the decree as personally liable for the amount found due.

We see no convincing reason to disagree with the decree and it is affirmed.

AFFIRMED.

O'Connor, J. J., and Matchett, J., concur.

39973

TILLIE AMBROSE,
Appellee,

vs.

SOPHIE SAWEIKIS and STANLEY SAWEIKIS,
Appellants.

APPEAL FROM CITY COURT OF CHICAGO HEIGHTS.

295 I.A. 611

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment by confession on two notes, one for $1000, the other for $1100, signed by defendants, who upon petition were granted leave to defend; upon trial before the court without a jury the finding was for plaintiff and the judgment against defendants was confirmed for $3049.50. Defendants appeal.

Defendants point out various alleged irregularities in the judgment notes, especially in the power of attorney and the cognovit. As the judgment by confession was opened and the case tried upon its merits the alleged irregularities are unimportant. Hansen v. Schlesinger, 125 Ill. 230, 237.

Defendants asserted that they had paid the amount of the notes to plaintiff. In the defense of payment the burden of proof was on defendants. Moseley v. Waite, 180 Ill. App. 408. Whether this defense was sustained depends upon the weight given to the variant stories of the witnesses.

Plaintiff and defendant Sophie Saweikis are sisters and Stanley Saweikis is the husband of Sophie; for a period of years prior to 1929 plaintiff lent sums of money to defendants aggregating something over $2100.

March 8, 1928, defendants executed a first mortgage in the sum of $3000, conveying to a loan association real estate owned by them in Chicago Heights; in May, 1928, at plaintiff's request for security for the moneys lent defendants, they executed and delivered

TITLE AGENCY,
Appellee,

vs.

SOPHIE SAWSKIS and STANLEY SAWSKIS,
Appellants.

APPEAL FROM CITY COURT OF CHICAGO HEIGHTS.

295 I.A. 611

Mr. JUSTICE MCGURREY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment by confession on two notes, one for $1000, the other for $1100, signed by defendants, who upon petition were granted leave to defend; upon trial before the court without a jury, the finding was for plaintiff and the judgment against defendants was confirmed for $3049.30. Defendants appeal.

Defendants point out various alleged irregularities in the judgment notes, especially in the power of attorney and the confession. As the judgment by confession was opened and the case tried upon its merits the alleged irregularities are unimportant. Hansen v. Collingwood, 125 Ill. 230, 237.

Defendants asserted that they had paid the amount of the notes to plaintiff. In the defense of payment the burden of proof was on defendants. Moseley v. Yaple, 180 Ill. Ap. 402. Whether this defense was sustained depends upon the weight given to the variant stories of the witnesses.

Plaintiff and defendant Sophie Sawskis are sister and Stanley Sawskis is the husband of Sophie; for a period of years prior to 1929 plaintiff lent sums of money to defendants aggregating something over $2100.

March 8, 1929, defendants executed a first mortgage in the sum of $3000, conveying to a loan association real estate owned by them in Chicago Heights; in May, 1929, at plaintiff's request for security for the moneys lent defendants, they executed and delivered

to plaintiff a second mortgage trust deed on the Chicago Heights property in the sum of $2300 to Louis A. Whelan, trustee.

The two notes involved in this suit are dated September 16, 1929, and defendants testified that they were delivered to plaintiff undated in 1925 and 1926. The court, however, could properly accept the testimony of Marion Labutis, daughter of plaintiff, to the effect that the notes were in her handwriting and signed by the defendants in her presence on the date they bore. The daughter Marion was then living in the home of the defendants and the notes were executed at that place and apparently were not delivered to plaintiff at that time.

In the latter part of 1929 plaintiff, at the request of defendants, returned her second mortgage to them so they could clear their property and refinance it with a new first mortgage. Plaintiff received no money for the surrender of the second mortgage but apparently did this as a favor to her sister.

Defendants then made a new first mortgage in the sum of $4600, dated January 23, 1930, to a loan association of Chicago Heights. The old first mortgage was released and also Louis A. Whelan, trustee in plaintiff's second mortgage, released it on March 14, 1930. Upon the trial Mr. Whelan was asked whether the principal note was shown to him as paid when he executed this release, and he replied that he did not remember the individual case but presumed the note was presented to him as paid.

Defendants testified that out of the proceeds of this new loan they paid the old first mortgage and also paid for an automobile and partially from the proceeds from this new loan and in part from the proceeds of a life insurance policy they paid plaintiff $2300 in cash. Defendant Stanley Saweikis rather vaguely describes the insurance policy as for $2000 upon the life of a "fellow (who) died and left my wife the insurance."

to plaintiff a second mortgage trust deed on the Ulrich, Wright property in the sum of $2500 to Louis A. Whelan, trustee.

The two notes involved in this suit are dated September 16, 1929, and defendants testified that they were delivered to plaintiff dated in 1928 and 1926. The court, however, could properly accept the testimony of Marion Dunnis, daughter of plaintiff, to the effect that the notes were in her handwriting and signed by the defendants in her presence on the date they bore. The daughter Marion was then living in the home of the defendants and the notes were executed at that time and apparently were not delivered to plaintiff at that time.

In the latter part of 1929 plaintiff, at the request of defendants, returned her second mortgage to them so they could clear their property and refinance it with a new first mortgage. Plaintiff received no money for the surrender of the second mortgage but apparently did this as a favor to her sister.

Defendants then made a new first mortgage in the sum of $4000, dated January 23, 1930, to a loan association of Michigan City. The old first mortgage was released and also Louis A. Whelan, trustee in plaintiff's second mortgage, released it on March 14, 1930. Upon the trial Mr. Whelan was asked whether the principal note was given to him as said when he executed this release, and he replied that he did not remember the individual case but presumed the note was presented to him as paid.

Defendants testified that out of the proceeds of this new loan they paid the old first mortgage and also paid for an automobile and partially from the proceeds from this new loan and in part from the proceeds of a life insurance policy they paid plaintiff $300 in cash. Defendant Stanley Zawislis rather vaguely describes the insurance policy as for $3000 upon the life of a "fellow (who) died and left my wife the money."

Was the evidence of defendants sufficient to establish the defense of payment? Plaintiff denied that any payment was made to her out of the proceeds of the new loan or from any other source. She said that after she had surrendered her second mortgage and the new loan was made she made repeated demands on defendants for some security for their indebtedness and in August, 1930, they delivered to her the two notes in question.

Defendants testified that when they paid plaintiff they received a receipt from her, but in February, 1933, their home in Chicago Heights was damaged by fire and defendants said that all their papers relating to plaintiff's second mortgage, including plaintiff's receipt, were destroyed by fire; that when they paid plaintiff the amount of the notes they requested that they be returned to them but plaintiff represented that she had either mislaid or lost them and that she would return them as soon as she found them. On the other hand plaintiff testified that she made efforts to collect the money, calling on defendants' place of business for this purpose.

Plaintiff in rebuttal had the testimony of a brother of plaintiff and defendant Sophie, a sister of these women, also a brother-in-law and a niece of both parties. All testified to conversations with defendant Sophie from 1934 to and including 1937, in which Sophie admitted that she owed plaintiff more than $2000. These conversations took place from four to seven years after the time defendants claim they paid plaintiff. From this record we can not say the trial court was clearly wrong in holding that defendants failed to prove they had paid plaintiff.

Defendants suggest that the statute of limitations had run against the notes. This is upon the assumption that the notes were executed and delivered in 1925 and 1926. The court properly found that the notes were executed on the date they bore - September 16,

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1929. Other points are made by defendants, which are not of decisive importance.

The decision of the case turned upon the credibility of the witnesses. It is impossible to reconcile the variant stories. The trial court saw the witnesses and heard them testify and had a much better opportunity to judge of their credibility than have we. We cannot say the conclusion is manifestly against the weight of the evidence, and as there were no reversible errors upon the trial the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

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AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39923

ROSE MINX,
Appellant,

vs.

BERNICE YENERICH and MRS.
B. G. YENERICH,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

295 I.A. 612

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in tort for personal injuries and upon trial by jury the court, at the close of plaintiff's evidence, directed a verdict for defendant and entered judgment thereon, from which plaintiff appeals.

The controlling question is whether the court erred in directing the verdict. If there was any evidence considered in the light most favorable to the plaintiff, whereby the jury could (acting reasonably) find for the plaintiff, it was error to give the instruction. That rule is so well settled as to make extended citations unnecessary. Some of the cases cited are Mirich v. Forschner Contracting Co., 312 Ill. 343; Capelle v. Chicago & N. W. Ry. Co., 280 Ill. App. 371; Fisher v. Wittler, 285 Ill. App. 261, 270, 271, 272.

The complaint filed June 29, 1936, charged that plaintiff on May 16, 1936, was injured in an automobile collision which occurred that day at the intersection of Karlov avenue and Hirsch street in Chicago. The complaint charged negligence of defendant, due care on plaintiff's part, and in one count plaintiff charged that the negligence of the defendant was wilful and wanton.

There was evidence tending to show that at the time of the occurrence plaintiff was riding in an automobile owned and driven by her son, who was 27 years of age and lived at St. Charles, Illinois, while his parents lived at 4236 Kamerling avenue in Chicago.

39923

ROSE MINX,
Appellant,

vs.

BENJION YENNIKOI and ANO.
E. G. YAMAMOTO,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

295 I.A. 612

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in tort for personal injuries and upon trial by jury the court, at the close of plaintiff's evidence, directed a verdict for defendant and entered judgment thereon, from which plaintiff appeals.

The controlling question is whether the court erred in directing the verdict. If there was any evidence considered in the light most favorable to the plaintiff, whereby the jury could (acting reasonably) find for the plaintiff, it was error to give the instruction. That rule is so well settled as to make extended citations unnecessary. Some of the cases cited are Aitch v. Forschmer Contracting Co., 312 Ill. 343; Cassile v. Chicago & N. Hy. Co., 280 Ill. App. 371; Hiser v. Witter, 288 Ill. App. 261, 270, 271, 272.

The complaint filed June 29, 1936, charged that plaintiff on May 16, 1936, was injured in an automobile collision which occurred that day at the intersection of Barlow avenue and Birch street in Chicago. The complaint charged negligence of defendant, due care on plaintiff's part, and in one count plaintiff charged that the negligence of the defendant was wilful and wanton.

There was evidence tending to show that at the time of the occurrence plaintiff was riding in an automobile owned and driven by her son, who was 27 years of age and lived at St. Charles, Illinois, while his parents lived at 4236 Kimerling avenue in Chicago.

Plaintiff and her son sat in the front seat of the automobile, an Essex, plaintiff on the right hand side of the seat and the driver on the left; it was a clear day. Hirsch street runs east and west, Karlov avenue north and south. Both streets are about 30 feet wide and paved with asphalt; there were no traffic signals at the intersections; at the northeast, southeast and northwest corners of the intersection were apartment buildings two or three stories in height, and on the southwest corner of the intersection was a school which was in session. The Essex car in which plaintiff was riding was being driven west on the north side of Hirsch street at about 15 miles an hour; as it approached the intersection the speed was slowed down to about 12 miles an hour. As the driver was crossing the intersection he noticed another automobile coming east on the south side of Hirsch street at a speed of about 20 miles an hour. This east bound car came about to the south walk line on the west side of Karlov avenue, where it stopped. When the right hand side of the car in which plaintiff was riding was about 5 feet from the north curb line of Hirsch street and past the center of Karlov avenue, it was hit by a Chevrolet automobile being driven south on the west side of Karlov avenue by Bernice Yenerich at a speed estimated by an impartial witness (the driver of the east bound car) to be 40 miles an hour. The Chevrolet was owned by the mother of Bernice Yenerich, and the mother and daughter are both defendants. Bernice, 18 years of age, was taking her mother for a drive in the mother's car. Bernice was called as a witness by plaintiff under section 60 of the Civil Practice act. She estimated the speed at which she was driving to be 20 miles an hour. She says she looked to the left when she reached the north cross walk of Hirsch street, but did not see any traffic. She says she did not change the speed at which she was driving at any time up to the accident. A picture

Plaintiff and her son sat in the front seat of the automobile, as Maxey, plaintiff on the right hand side of the seat and the driver on the left; it was a clear day. Hirsch Street runs east and west, Harlov avenue north and south. Both streets are about 30 feet wide and paved with asphalt; there were no traffic signals at the intersections; at the northeast, southeast and northwest corners of the intersection were apartment buildings two or three stories in height, and on the southwest corner of the intersection was a school which was in session. The Essex car in which plaintiff was riding was being driven west on the north side of Hirsch street at about 15 miles an hour; as it approached the intersection the speed was slowed down to about 12 miles an hour. As the driver was crossing the intersection he noticed another automobile coming east on the south side of Hirsch street at a speed of about 30 miles an hour. This east bound car came about to the south side of the west side of Harlov avenue, where it stopped. When the right hand side of the car in which plaintiff was riding was about 3 feet from the north curb line of Hirsch street and past the center of Harlov avenue, it was hit by a Chevrolet automobile coming driven south on the west side of Harlov avenue by Bernice Yemerich at a speed estimated by an impartial witness (the driver of the east bound car) to be 40 miles an hour. The Chevrolet was owned by the mother of Bernice Yemerich, and the mother and daughter are both defendants. Bernice, 19 years of age, was taking her mother for a drive in the mother's car. Bernice was called as a witness by plaintiff under section 60 of the Civil Practice Act. She estimated the speed at which she was driving to be 20 miles an hour. She says she looked to the left when she reached the north cross walk of Hirsch street, but did not see any traffic. She says she did not change the speed at which she was driving at any time up to the accident. A picture

showing the condition of the Essex car is in evidence. It discloses, with some other damage, a broken right hand door window. The impact of the collision pushed the Essex car 10 or 12 feet to the south and tipped it over on the east bound automobile. The left front fender and the headlight of the east bound car were damaged.

The driver of the Essex car says that as he approached Karlov avenue he slowed down to 13 miles an hour; that he had been driving since 1929; that his car was in good condition; that he was not in a hurry; that he was not talking to his mother; that he first saw the defendants' car when he was west of the center line of Karlov avenue; that he looked both sides of the street before he crossed the intersection; that his eyesight is perfect; he says he looked north when he came to the intersection but did not see any car on Karlov avenue. He came right on and was past the center line of Karlov avenue when his mother screamed and this made him look north; he would not have seen the south bound car if his mother had not screamed; defendants' car was then 25 feet north of the north curb line but had not as yet come into Hirsch street; he did notice the car coming east. The crash broke the hinges of the front seat of the automobile and threw plaintiff over on her back and onto the back seat. Witness says, "Seeing a car in front of you and one alongside of you, you have to think fast; I didn't exactly lose my head. I tried to pull away a little bit."

Plaintiff testified that she was not able to determine by observation the speed at which an automobile is moving. She saw defendants' car for the first time when they were at the cross-walk of Karlov avenue. It was then about 75 or 80 feet north and driving toward the south. She noticed again before the collision when the front of the car in which she was riding was "right near" the west curb of Karlov avenue. The south bound car was then, she thinks, about 15 feet away. She screamed and pushed her son with her left

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The driver of the Essex car says that as he approached Harlov avenue he slowed down to 13 miles an hour; that he had been driving since 1920; that his car was in good condition; that he was not in a hurry; that he was not talking to his mother; that he first saw the defendants' car when he was west of the center line of Harlov avenue; that he looked both sides of the street before he crossed the intersection; that his eyesight is perfect; he says he looked north when he came to the intersection but did not see any car on Harlov avenue. He came right on and was past the center line of Harlov avenue when his mother screamed and this made him look north; he would not have seen the south bound car if his mother had not screamed; defendants' car was then 25 feet north of the north curb line but had not as yet come into Hirsch street; he did notice the car coming east. The crash broke the hinges of the front seat of the automobile and threw plaintiff over on her back and onto the back seat. Witness says, "Seeing a car in front of you and one alongside of you, you have to think fast; I didn't exactly lose my head. I tried to pull away a little bit."

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arm; as soon as she screamed the car in which she was riding was hit. She had ridden with her son prior to this time. The speedometer of his car was working; she looked at it before they reached Karlov avenue but not theretofore. She says, "When we were at the east cross-walk of Karlov I looked to the north and saw an automobile coming south; at that time a car was going east from the west. I was not talking to my son. I didn't know how fast or slow the car from the north was going. It was quite a ways away from me then - about 75 or 80 feet on the right hand side of the street; I did not keep watching it; I first looked at it when I got to the east cross-walk. At that time I did not say anything to my boy."

A colloquy between the court and the attorneys representing the different parties prior to the giving of the instruction indicates that the theory upon which it was asked and given was that plaintiff was guilty of contributory negligence; that she had not established due care on her part. That question was, of course, immaterial if there was any evidence from which the jury might reasonably have found that defendants were guilty of wilful and wanton negligence as alleged in one of the counts of the declaration. That question was not raised by any motion for a directed verdict as to that particular count. The sole question, therefore, for the determination of this court is whether there were any facts from which the jury might find that plaintiff at and just before the collision was in the exercise of due care for her own safety. Some of the cases referred to at the time of the colloquy between the Judge and the attorneys indicate that the instruction was given upon the theory that Roy Minx, the son of plaintiff, who drove the car in which she was riding, was the agent of plaintiff; that he was negligent and that his negligence would be imputed to plaintiff. As supporting that theory at the hearing and in this court, defendants cite Stoutz v. Nicoson, 270 Ill. App. 28; and Thomas v. Buchanan, 272

arm; as soon as she approached the car in which she was riding was hit. She had ridden with her son prior to this time. As speedometer of his car was running, she looked at it before they reached Harlov avenue but not thereafter. She says, "I was to sure at the east cross-walk of Harlov I looked to the north and saw an automobile coming south; at that time a car was going east from the west. I was not talking to my son. I didn't know how fast or slow the car from the north was going. It was quite a ways away from me then - about 75 or 80 feet on the right hand side of the street; I did not keep watching it; I first looked at it when I got to the east cross-walk. At that time I did not say anything to my boy."

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Ill. App. 308. These cases are, we think, distinguishable. Moreover, it is to be noted that the judgment of the Appellate court in Thomas vs. Buchanan was reversed by the Supreme court in 357 Ill. 270. There is, we hold, no evidence in this record tending to show that the driver of the Essex car was the agent of plaintiff, and if negligent his negligence would be imputed to her. The question before this court, therefore, would be narrowed to a consideration of whether there is any evidence in the record tending to show that plaintiff was in the exercise of due care. The trial Judge in the course of the colloquy, upon suggestion of the attorney for plaintiff that the Yenerich car going south had no right to go into that intersection, made the following observation:

"You mean the court should submit every case to the jury? Now, then, you both have your reporters, and I hope the Judges of the Appellate court will read what we are saying here this morning. Involved in every question of whether it should go to the jury or not are disputed facts, - the question of speed, the relative position on the street, the operation of the car, the condition of the car as to brakes and all other things, and a hundred and one other things, - the condition of traffic. All these things are involved in what a person does under the circumstances.

Now, a person coming to a crossing, to a street crossing - and I tried it this morning when I was coming downtown, just to get the benefit - the car going west, where there is a building on his right so that he cannot see the other car coming south, he has got to push his car, not only the front of car but he has to get the driver's seat in position where he could see the car on the right.

Now, the driver of this car did not look to the right. The mother was in the same position as he, in the front seat. He did not look to the right, because if he had he would have seen. He did not say he did not look to the right, but he said he did not see the car."

This is not an accurate statement of the evidence of the plaintiff mother. She testified that she looked to the right and to the north and that she saw the car but it was, she thought, 80 feet to the north. They were then at the intersection; it was only 30 feet across the street. She says she knew nothing about judging the speed of moving automobiles. She saw the south bound car approaching and there was no reason for her to suppose that the driver did not see its approach. She was not the driver of the car; her

III. App. 308. These cases are, we think, distinguishable. Moreover, it is to be noted that the judgment of the appellate court in Tooze vs. Lundgren was reversed by the Supreme court in 287 Ill. 270. There is, we hold, no evidence in this record tending to show that the driver of the truck nor the agent of plaintiff, and if negligent his negligence would be imputed to her. The question before this court, therefore, would be reviewed on a consideration of whether there is any evidence in the record tending to show that plaintiff was in the exercise of due care. The trial judge in the course of the colloquy, upon suggestion of the attorney for plaintiff that the Yenerich car going south had no right to go into that intersection, made the following observation:

"You mean the court should submit every case to the jury? Now, then, you both have your remarks, and I see the judges of the Appellate court will read what we are saying here this morning. Involved in every question of whether it should go to the jury or not are disputed facts, - the question of speed, the relative position on the street, the position of the car, the condition of the car as to brakes and all other things, and a number of other things, - the condition of traffic. All these things are involved in what a person does under the circumstances.

Now, a person coming to a crossing, to a street crossing - and I tried it this morning when I was on the downtown, just to get the benefit - the car going west, where there is a building on the right so that he cannot see the other car coming south, he has got to push his car, not only the front of car but he has to get the driver's seat in position where he could see the car on the right.

Now, the driver of this car did not look to the right. The motor was in the same position as he, in the front seat. He did not look to his right, because if he had he would have seen. He did not say he did not look to the right, but he said he did not see the car."

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relationship to the driver was that of a guest. On him and not on her devolved the duty of driving the car. The evidence which we have narrated discloses that it was for the jury to determine whether the plaintiff was in the exercise of due care. As the language of the trial court suggests, it may be difficult for the trial judge (as it sometimes is for this court) to determine whether there is evidence tending to show that a plaintiff is in the exercise of due care. Difficult as that duty may be at times, it is imposed upon the trial court as it is imposed upon this court by well established rules of law. We may, however, suggest that under section 68, subsection 3, of the Civil Practice Act, where a request is made to the court for a directed verdict the court may reserve its decision thereon and submit the case to the jury under proper instructions as to the law applicable. After the case is thus submitted to the jury and after receiving and recording the verdict of the jury and before judgment is entered in the case, if the trial judge is of opinion as a matter of law that the party requesting the directed verdict was entitled thereto, he may order judgment in accordance with such opinion notwithstanding the verdict entered. This procedure would seem to be helpful in doubtful cases. We hold that the court erred in directing the jury to return a verdict for the defendant. For that error the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

relationship to the driver was that of a guest. He did not on her devolved the duty of driving the car. The evidence which we have narrated discloses that it was for the jury to determine whether the plaintiff was in the exercise of due care. As the language of the trial court suggests, it may be difficult for the trial judge (as it sometimes is for this court) to determine whether there is evidence tending to show such a plaintiff is in the exercise of due care. Difficult as that duty may be at times, it is imposed upon the trial court as it is imposed upon this court by well established rules of law. We may, however, suggest that under section 6[illegible], subsection 5, of the Civil Practice Act, where a request is made to the court for a directed verdict the court may reserve its decision thereon and submit the case to the jury under proper instructions as to the law applicable. After the case is thus submitted to the jury and after receiving and recording the verdict of the jury and before judgment is entered in the case, if the trial judge is of opinion as a matter of law that the party requesting the directed verdict was entitled thereto, he may order judgment in accordance with such opinion notwithstanding the verdict entered. This procedure would seem to be helpful in doubtful cases. We hold that the court erred in directing the jury to return a verdict for the defendant. For that error the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Scanlan, J., concur.

38891

IN RE ESTATE OF MICHAEL DeMARCHI, deceased.

CHARLES DeMARCHI, administrator of the estate of MICHAEL DeMARCHI, deceased,

Appellee,

v.

WILLIAM J. HANNAN, individually and as administrator of the estate of CARRIE DeMARCHI, deceased,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

295 I.A. 612

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Michael and Carrie DeMarchi, who had lived together as husband and wife for forty years, died as a result of an automobile accident in August, 1932, his death preceding hers by only one day. Thereafter both estates were probated, Charles DeMarchi being appointed administrator of the estate of his brother, Michael, and William J. Hannan, Carrie's son by a former marriage, appointed administrator of her estate. All the personal property of both decedents was delivered to Hannan as administrator, and was duly listed in the inventory and supplementary inventory which he filed in the probate court. After both administrators had qualified and were acting in their respective estates, Charles DeMarchi, hereinafter referred to as petitioner, filed a petition in the probate court praying for a citation against William J. Hannan, respondent, seeking to recover from him certain assets which the petitioner claimed belonged to the estate of Michael DeMarchi, deceased. A hearing was had in the probate court, wherein the issue of fact

38891

IN RE ESTATE OF MICHAEL DEMAKOSH,
deceased.

CHARLES DEMAKOSH, administrator of
the estate of MICHAEL DEMAKOSH, de-
ceased,

Appellee,

v.

WILLIAM J. HANNAN, individually and
as administrator of the estate of
CARRIE DEMAKOSH, deceased,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

295 I.A. 612

MR. PRESIDING JUSTICE PRIMES
DELIVERED THE OPINION OF THE COURT.

Michael and Carrie DeMakosh, who had lived together as husband and wife for forty years, died as a result of an automobile accident in August, 1932, his death preceding hers by only one day. Thereafter both estates were probated, Charles DeMakosh being appointed administrator of the estate of his brother, Michael, and William J. Hannan, Carrie's son by a former marriage, appointed administrator of her estate. All the personal property of both decedents was delivered to Hannan as administrator, and was duly listed in the inventory and supplementary inventory which he filed in the probate court. After both administrators had qualified and were acting in their respective estates, Charles DeMakosh, hereinafter referred to as petitioner, filed a petition in the probate court praying for a citation against William J. Hannan, respondent, seeking to recover from him certain assets which the petitioner claimed belonged to the estate of Michael DeMakosh, deceased. A hearing was had in the probate court, wherein the issue of fact

arose as to whether or not Michael and Carrie DeMarchi were ever married. Upon the determination of this question depended the legal ownership of the assets which formed the subject of the controversy. The probate court entered judgment finding that the respondent, as administrator of the estate of Carrie DeMarchi, deceased, was the lawful owner, and ordered that the petition be dismissed. On appeal by petitioner to the circuit court a hearing was had under a stipulation between the parties that the transcript of testimony taken on the hearing in the probate court, and the exhibits introduced in evidence therein, might be offered in evidence on the trial in the circuit court by the respective parties, who reserved to themselves the right to object to any of the evidence and to offer such additional evidence on the hearing as they might desire. The circuit court entered judgment reversing the order of the probate court, finding that Michael and Carrie DeMarchi were not legally married; that she was not the widow or heir at law of Michael DeMarchi; that petitioner, as administrator of the estate of Michael DeMarchi, was the legal owner of the assets involved, which were specifically described in the judgment; and respondent was ordered immediately to deliver these assets to petitioner. By this appeal respondent seeks to reverse the judgment of the circuit court.

The petition for citation alleged in substance that William J. Hannan had in his possession or control stocks and bonds of various corporations, securities, cash and certain other assets, the exact nature of which was unknown to petitioner but which it was claimed belonged to the estate of Michael DeMarchi, and prayed that William J. Hannan appear and answer the petition. The answer, filed by Hannan, individually and as administrator of the estate of Carrie DeMarchi, deceased, denied the allegations of the petition and averred that

arose as to whether or not Michael and Carrie DeMarcoh were ever married. Upon the determination of this question depended the legal ownership of the assets which formed the subject of the controversy. The probate court entered judgment finding that the respondent, as administrator of the estate of Carrie DeMarcoh, deceased, was the lawful owner, and ordered that the petition be dismissed. On appeal by petitioner to the circuit court a hearing was had under a stipulation between the parties that the transcript of testimony taken on the hearing in the probate court, and the exhibits introduced in evidence therein, might be offered in evidence on the trial in the circuit court by the respective parties, who reserved to themselves the right to object to any of the evidence and to offer such additional evidence on the hearing as they might desire. The circuit court entered judgment reversing the order of the probate court, finding that Michael and Carrie DeMarcoh were not legally married; that she was not the widow or heir at law of Michael DeMarcoh; that petitioner, as administrator of the estate of Michael DeMarcoh, was the legal owner of the assets involved, which were specifically described in the judgment; and respondent was ordered immediately to deliver these assets to petitioner. By this appeal respondent seeks to reverse the judgment of the circuit court.

The petition for citation alleged in substance that William J. Hannan had in his possession or control stocks and bonds of various corporations, securities, cash and certain other assets, the exact nature of which was unknown to petitioner but which it was claimed belonged to the estate of Michael DeMarcoh, and prayed that William J. Hannan appear and answer the petition. The answer, filed by Hannan, individually and as administrator of the estate of Carrie DeMarcoh, deceased, denied the allegations of the petition and averred that

Michael and Carrie DeMarchi were husband and wife; that Michael DeMarchi died intestate August 10, 1932, leaving him surviving Carrie, his widow, John and Raphael DeMarchi, his brothers, Theresa Roberts and Jennie Hansen, his sisters, and George DeMarchi, his nephew; that Carrie DeMarchi died intestate August 11, 1932, leaving her surviving William J. Hannan, her son, the respondent, as her only heir at law and next of kin; that all the estate of Carrie DeMarchi became the property of her son, William, pursuant to the Illinois statutes; and that Charles DeMarchi, as administrator of the estate of Michael DeMarchi, deceased, had no interest of any kind or nature in the estate of Carrie DeMarchi, deceased.

The undisputed evidence discloses that in 1883 Carrie Larson was married to one John Hannan. Of this marriage there was born a son, William J. Hannan, respondent herein. John Hannan deserted his wife in 1885, when respondent was two years of age. There is testimony to the effect that about six years later, 1891 or 1892, Carrie Hannan told her sister that she was going to be married, and shortly thereafter appeared with Michael DeMarchi and said to the members of the family that they had been married. From that time until their deaths in 1932 they lived together as husband and wife. The evidence conclusively shows that over this entire period of forty years they referred to and introduced each other as husband and wife, always lived under the name of Mr. and Mrs. DeMarchi, and were known as such to relatives, neighbors and friends. During all this time brothers and sisters of Michael DeMarchi associated with him and Carrie in their home, and the father of Michael DeMarchi lived with them and under their care during the last years of his life and until his death. The DeMarchis took several trips to Wisconsin to visit Carrie's relatives and her family visited at their home in Chicago from time to time.

During this period of forty years, except for the last

Michael and Carrie DeMarchi were husband and wife; that Michael DeMarchi died intestate August 10, 1922, leaving him surviving Carrie, his widow, John and Raphael DeMarchi, his brothers, Therese Roberts and Jennie Hansen, his sisters, and George DeMarchi, his nephew; that Carrie DeMarchi died intestate August 11, 1922, leaving her surviving William J. Hansen, her son, the respondent, as her only heir at law and next of kin; that all the estate of Carrie DeMarchi became the property of her son, William, pursuant to the Illinois statutes; and that Charles DeMarchi, as administrator of the estate of Michael DeMarchi, deceased, had no interest of any kind or nature in the estate of Carrie DeMarchi, deceased.

The undisputed evidence discloses that in 1883 Carrie Larson was married to one John Hansen. Of this marriage there was born a son, William J. Hansen, respondent herein. John Hansen deserted his wife in 1888, when respondent was two years of age. There is testimony to the effect that about six years later, 1891 or 1892, Carrie Hansen told her sister that she was going to be married, and shortly thereafter appeared with Michael DeMarchi and said to the members of the family that they had been married. From that time until their death in 1922 they lived together as husband and wife. The evidence conclusively shows that over this entire period of forty years they referred to and introduced each other as husband and wife, always lived under the name of Mr. and Mrs. DeMarchi, and were known as such to relatives, neighbors and friends. During all this time brothers and sisters of Michael DeMarchi associated with him and Carrie in their home, and the father of Michael DeMarchi lived with them and under their care during the last years of his life and until his death. The DeMarchis took several trips to Wisconsin to visit Carrie's relatives and her family visited at their home in Chicago from time to time.

During this period of forty years, except for the last

few years, the DeMarchis worked together in business matters. At the beginning Mrs. DeMarchi cooked in a restaurant. Later she operated an ice cream parlor. Still later she conducted a large rooming house for which she paid $900 and operated it herself for seven or eight years while DeMarchi was driving a wagon. At one time they had an ice cream parlor in Evanston, and at another time a butcher shop. Mrs. DeMarchi did her own housework during all the years, in addition to attending to these various business ventures. Their savings account and safety deposit box were held jointly, and all the securities which petitioner sought to recover were found in this joint safety box. They also took title to and owned various parcels of real estate in joint tenancy, and in one of the deeds, conveying parcels of property to them, they were described as husband and wife.

The principal conflict in the evidence relates to the last date on which John Hannan, the first husband of Carrie DeMarchi, had been seen alive; whether it was before 1891, when the DeMarchis began to live together as husband and wife, or after that date. Three of respondent's witnesses testified that John Hannan had not been seen or heard of subsequent to 1885, which was the date he deserted his wife, and one of them testified that William J. Hannan, brother of John Hannan, had said that John and fallen from a wagon and died of a fractured skull and was buried in Potter's field immediately after the desertion. To rebut this evidence petitioner offered two witnesses as to the date when John Hannan was last seen. The first of these, Conrad Rose, testified that he had known a John or Jack Hannan, who was a teamster in the South Water Market, whom he designated as "the same John Hannan as was spoken of here." He was described by the witness as "perhaps five feet ten, a fairly good sized man, kind of florid complexion *** somewheres around thirty, I imagine." The

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witness said that he had worked around the South Water Market all his life, had known the person described as John Hannan, "somewhere in 1891 or 1892," and to the best of his recollection had last seen him in 1895 or 1896, several years after the world's fair. On cross-examination the following questions were propounded to him and his answers were as indicated:

"Q. Whereabouts did you see Jack Hannan the last time you saw him?

A. On South Water Market, on Clark street there at the corner.

Q. What was he doing? A. Well, to the best of my recollection, he was still working.

Q. Well, what was he doing at the time you saw him. A. He had a horse and wagon.

Q. Did you have any conversation with him? A. Well, no, not any more than you would say in your business day.

Q. What part of '95 or '96 was it? A. Either the latter part of '95 or the early part of '96, because I went back to work for the American Express Company on the 27th day of April; that's the date.

Q. And you said it might have been early in 1896 or late in 1895 that you saw him? A. Somewhere along in the winter time, in the fall or in the winter.

Q. In the fall or in the winter? A. It is pretty hard to remember.

Q. Certainly it is hard to remember. A. I didn't set no date when I saw him. Charles DeMarchi, one of the brothers of Michael DeMarchi, asked me to come here to testify. He asked me if I knew a man named Jack Hannan and I thought a while, and I asked another man down on South Water and then when he recalled him to me, then I remembered him.

Q. Oh, you didn't remember him until - - A. Well, you see, there are so many men down there that you meet them today and tomorrow, but the name was familiar when I was first asked, and to refresh my memory I went to this man and asked him, and then he described him to me, and he said, 'You ought to know him,' and then it came back to me.

Q. You had forgotten all about Hannan until somebody talked to you the other day? A. Well, if somebody hadn't asked me I would have never thought of him any more, certainly.

Q. And you couldn't remember him until he described him to you?

A. The name was familiar, as I told you before.

Q. Yes, but you couldn't remember the man? A. Well, I couldn't bring him back to my mind right away until I talked to somebodyelse.

Q. And if you hadn't talked to somebody else, you wouldn't have remembered him, would you? A. Why, no, certainly not, because I had no occasion to.

Q. And you are now telling me what this other man told you about who Jack Hannan was? A. He didn't tell me who he was, but he described him to me.

Q. He described him to you? A. Yes, and then I remembered him."

Robert Levis, the other witness produced by petitioner,

witness said that he had worked around the South Water Market all his life, had known the person described as John Hannan, "somewhere in 1901 or 1902," and at the best of his recollection had last seen him in 1892 or 1893, several years after the world's fair. On cross-examination the following questions were propounded to him and his answers were as indicated:

"Q. Horsemouth did you see Jack Hannan the last time you saw him?

A. On South Water Market, on Clark street there ... the corner.

Q. What was he doing? A. Well, to the best of my recollection, he was still working.

Q. Well, what was he doing at the time you saw him? A. He had a horse and wagon.

Q. Did you have any conversation with him? A. Well, no, not any more than you could say in your business day.

Q. What part of '92 or '93 was it? A. Either the latter part of '92 or the early part of '93, because I went back to work for the American Express Company on the 27th day of April, that's the date.

Q. And you said it might have been early in 1893 or late in 1892 that you saw him? A. Somewhere along in the winter time, in the fall or in the winter.

Q. In the fall or in the winter? A. It is pretty hard to remember.

Q. Certainly it is hard to remember. A. I didn't set no date when I saw him. Charles Dellavoin, one of the brothers of Michael Dellavoin, asked me to come here to testify. He asked me if I knew a man named Jack Hannan and I thought a while, and I asked another man down on South Water and then when he recalled him to me, then I remembered him.

Q. Oh, you didn't remember him until - - A. Well, you see, there are so many men down in the that you meet them today and tomorrow, but the name was familiar when I was first asked, and to refresh my memory I went to this man and asked him, and then he described him to me, and he said, 'You go to ... him,' and then it came back to me.

Q. You had forgotten all about Hannan until somebody talked to you the other day? A. Well, if somebody hadn't asked me I would have never thought of him any more, certainly.

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Q. And if you hadn't talked to somebody else, you wouldn't have remembered him, would you? A. No, no, certainly not, because I had no occasion to.

Q. And you are now telling me that this other man told you about who Jack Hannan was? A. He didn't tell me who he was, but he described him to me.

Q. He described him to you? A. Yes, and then I remembered him."

Robert Levin, the other witness produced by petitioner,

testified that he was sixty-four years old, had worked at the South Water market back in the 1890's, and was a cousin of John Hannan. He said that he last saw him in 1895 or 1896, about thirty-eight years before the trial, at the corner of Ada and Fulton streets. "At that time he was in pretty bad shape, I guess. He asked me to buy him a pair of shoes, so I gave him the money to buy the shoes, and I told him to come over to the house. I never seen him after that." On cross-examination, the witness said that he didn't know where John Hannan had lived or worked prior to that time, didn't know much about him, and only saw him on two or three occasions, and thereupon respondent's counsel propounded the following questions:

"Q. Now, how do you fix it at just thirty-eight years? That's a long time back. A. Well, that's as near as I can get it.

Q. It may have been a little longer than that? A. Maybe, yes.

Q. It may possibly be forty or forty-five years? A. I don't think its that long.

Q. Well, it may be forty years; that's just your best recollection? A. Yes, that's my best recollection."

In scrutinizing Rose's testimony it seems reasonably clear that there was no evidence whatsoever to connect the Hannan about whom he testified with the John Hannan who had been the husband of Carrie DeMarchi, and in fact no attempt was made to do so except through the inquiry of petitioner's counsel whether he referred to the same John Hannan "that's mentioned here today." Rose described the John or Jack Hannan whom he had known as a fairly good sized man, five feet ten, and with a florid complexion, but the record contains no description whatever as to the physical appearance of the first husband of Carrie DeMarchi. On cross-examination Rose admitted that he had never seen Hannan after meeting him on the corner of Clark and South Water market some thirty-nine years before the trial, where he merely addressed him as "Hello, Jack, how are you," and had no further conversation with him. He fixed the time of this meeting as five or six months prior to April 27, 1896, by saying that on the latter

testified that he was sixty-four years old, had worked at the South Water market back in the 1890's, and was a cousin of John Hannan. He said that he last saw him in 1896 or 1899, about thirty-eight years before the trial, at the corner of Ada and Fulton streets. "At that time he was in pretty bad shape, I guess. He asked me to buy him a pair of shoes, so I gave him the money to buy the shoes, and I told him to come over to the house. I never seen him after that." On cross-examination, the witness said that he didn't know where John Hannan had lived or worked prior to that time, didn't know much about him, and only saw him on two or three occasions, and thereupon respondent's counsel propounded the following questions:

"Q. Now, how do you fix it at just thirty-eight years? That's a long time back. A. Well, that's as near as I can get it.

Q. It may have been a little longer than that? A. Maybe, yes.

Q. It may possibly be forty or forty-five years? A. I don't think it's that long.

Q. Well, it may be forty years; that's just your best recollection? A. Yes, that's my best recollection."

In corroborating Rose's testimony it seems reasonably clear that there was no evidence whatsoever to connect the Hannan about whom he testified with the John Hannan who had been the husband of Carrie Delaroin, and in fact no attempt was made to do so except through the inquiry of petitioner's counsel whether he referred to the same John Hannan "that's mentioned here today." Rose described the John or Jack Hannan whom he had known as a fairly good sized man, five feet ten, and with a florid complexion, but the record contains no description whatsoever as to the physical appearance of the first husband of Carrie DeLaroin. On cross-examination Rose admitted that he had never seen Hannan after meeting him on the corner of Clark and South Water market some thirty-nine years before the trial, where he merely addressed him as "Hello, Jack, how are you," and had no further conversation with him. He fixed the time of this meeting as five or six months prior to April 27, 1899, by saying that on the latter

date he went to work for the American Express Company, but there was no other connection between the two events and no explanation was offered by the witness showing why he was able to fix the time as six months before he made that application on April 27, 1896, as the time when he saw Hannan at Clark and South Water market. Whatever doubt may have existed in the mind of the probate court, who saw and heard the witness, as to the reliability of Rose's testimony, was evidently dissipated on cross-examination when he said that Charles DeMarchi, one of Michael's brothers, asked him if he had known a man named Jack Hannan and he couldn't recall whether he had or not until he spoke to another man on South Water street, who refreshed his memory and described Hannan to the witness, and on the hearing Rose admitted that if he "hadn't talked to somebody else [he] wouldn't have remembered him *** because I had no occasion to." The other witness, Levis, who on direct examination said that he was a cousin to John Hannan, remembered seeing him for the last time about thirty-eight years before trial at the corner of Ada and Fulton streets, but he was uncertain as to the year and frankly admitted that more than thirty-eight years might have elapsed since their last meeting.

The only other evidence adduced by petitioner bearing upon the controverted question of fact was the testimony of Frank R. McGirk, an attorney who had searched the records relating to divorces and marriages in Cook county covering the period from 1870 to 1933, and testified that as the result of his search he did not find any record of a divorce between John Hannan and Carrie Hannan nor of a marriage between Michael DeMarchi and Mrs. John Hannan, Carrie Larson or Carrie Larson Hannan. This of itself would not, of course, be conclusive, because it is a matter of common knowledge that people frequently become married and obtain divorces in other states and there is no evidence to indicate that these parties may not have

date he went to work for the American Express Company, but there was no other connection between the two events and no explanation was offered by the witness showing why he was able to fix the time as six months before he made that application on April 27, 1897, as the time when he saw Hannan at Clark and South Water markets. Whatever doubt may have existed in the mind of the probate court, who saw and heard the witness, as to the reliability of Rosie's testimony, was evidently dissipated on cross-examination when he said that Charles Delaroch, one of Michael's brothers, asked him if he had known a man named Jack Hannan and he couldn't recall whether he had or not until he spoke to another man on South Water street, who refreshed his memory and described Hannan to the witness, and on the hearing Rose admitted that if he "hadn't talked to somebody else [he] wouldn't have remembered him *** because I had no occasion to." The other witness, Levin, who on direct examination said that he was a cousin to John Hannan, remembered seeing him for the last time about thirty-eight years before trial at the corner of Ada and Milton streets but he was uncertain as to the year and finally admitted that it might have elapsed since their last meeting.

The only other evidence adduced by petitioner bearing upon the controverted question of fact was the testimony of Frank E. Moulik, an attorney who had searched the records relating to divorces and marriages in Cook county covering the period from 1870 to 1933, and testified that as the result of his search he did not find any record of a divorce between John Hannan and Carrie Hannan nor of a marriage between Michael Delaroch and Mrs. John Hannan, Carrie Larson or Carrie Larson Hannan. This of itself would not, of course, be conclusive, because it is a matter of common knowledge that people frequently become married and obtain divorces in other states and there is no evidence to indicate that these parties may not have

done so.

It was, of course, incumbent upon petitioner to assume the burden of establishing the allegations of his petition. The probate court, who saw and heard the witnesses, evidently regarded the testimony of Rose and Levis as of doubtful probative value. There is no convincing evidence by which either of these witnesses could have ascertained the dates so definitely. Their testimony, in 1934, related to casual meetings approximately forty years before, and it is extremely unlikely that either of them could possibly have remembered the exact years, or even approximated them, when there was nothing to fix the dates in their memory. Rose had merely a casual acquaintanceship with the Hannan about whom he testified, and Levis's interest in him was merely casual; he had seen him on only three occasions altogether. The occurrences about which both Rose and Levin testified were totally unrelated to any other events in their lives, and under the circumstances we are impelled to hold, after a careful examination of the record, that the testimony of these two witnesses should not be held of sufficient probative value to outweigh the testimony of three of respondent's witnesses who testified positively that they had never seen or heard from Hannan after his desertion in 1885, and whose relationship to the parties afforded a much more substantial basis for the testimony which they gave upon the hearing. Until the death of Michael and Carrie DeMarchi no one ever doubted that they were married, and their relationship over a period of forty years should not be lightly disturbed upon testimony so doubtful and unconvincing.

The law is well settled, and has been consistently followed in this state for many years, that the continuous absence of a person from his home or place of business for a period of seven years, during which nothing is heard from or concerning him, raises the presumption

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The law is well settled, and has been consistently followed in this state for many years, that the continuous absence of a person from his home or place of business for a period of seven years, during which nothing is heard from or concerning him, raises the presumption

of his death for all legal purposes. (Eddy v. Eddy, 302 Ill. 446, 452.) Johnson v. Johnson, 114 Ill. 611, contains a full review of the cases bearing on the presumption of death. In that case the complainant was married to one Albert Thurber on July 26, 1866, and after living together as husband and wife for three months Thurber deserted her and went away. About a year thereafter she received a letter from him. From then until the trial, in 1884, she had not seen or heard from him. Complainant's second marriage with defendant was solemnized in February, 1874, over six but less than seven years after the last knowledge of the former husband, and it was contended that as the law had not extended to seven years this presumption must control and therefore the second marriage was void. In discussing the question under consideration the court held that when the seven years had elapsed the fact of death is presumed, but that there is no presumption that the life continued during the entire period, or that it was or was not extinguished in any particular time within the seven years. Commenting on Kelly v. Drew, 12 Allen 107, the court said (p. 621):

"In the case last cited, a woman had married four years after her former husband was last heard from. Sixteen years afterwards the validity of her second marriage was called in question. The court held it valid, and said: 'No evidence was offered that the first husband had been heard from for twenty years, or that he had not died, or been divorced from her before her second marriage. Under the circumstances the presumption of the wife's innocence in marrying again might well overcome any presumption that a man, not heard from for four years before the marriage, or for sixteen years afterward, was alive, and her lawful husband, when she married the second time.' At the trial of this cause over sixteen years had elapsed since the last knowledge of the former husband, and we see no reason why these principles do not apply. *** The law did not impose on her, under the circumstances of this case, the duty of preserving the evidence of the dissolution of her former marriage, and producing it on the trial, but the burden was on the defendant to prove such facts and circumstances as would establish the invalidity of his marriage with complainant." (Italics ours.)

The authorities go further, however, and hold:

"When a marriage therefore has once been shown, however, celebrated, whether regularly or irregularly, or however proved, whether directly or by circumstantial evidence, the law raises a

of the death for all legal purposes. (Ex v. Eddy, 26 Ill. 446, 452.) Jenness v. Johnson, 114 Ill. 632, containing a full review of the cases bearing on the presumption of death. In that case the complainant was married to one Albert Johnson on July 26, 1866, and after living together as husband and wife for three months Johnson deserted her and went away. About a year thereafter she received a letter from him. From then until the trial, in 1884, she had not seen or heard from him. Complainant's second marriage with defendant was solemnized in February, 1874, over six but less than seven years after the last knowledge of the former husband, and it was contended that as the law had not extended to seven years this presumption must control and therefore the second marriage was void. In discussing the question under consideration the court held that when the seven years had elapsed the fact of death is presumed, but that there is no presumption that the life continued during the entire period, or that it was or was not established in any particular time within the seven years. Something on Kelly v. Kerr, 13 Ill. 107, the court said (p. 611):

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The author likes to further, however, and hold:

"When a marriage therefore has once been shown, however celebrated, whether regularly or irregularly, or however proved, whether directly or by circumstantial evidence, the law raises a

strong presumption in favor of its legality; so that the burden is with the party objecting throughout, and in every particular, to prove, against the constant pressure of this presumption of law, that it is illegal and void. And it has been considered that the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, because the law, besides casting the burden of proof upon the objecting party, will still presume in favor of the marriage, and this presumption increases in strength with the lapse of time through which the parties are cohabiting as husband and wife." (Italics ours.) (Bishop on Marriage and Divorce, sec. 457.)

In the case at bar the evidence conclusively establishes the fact that either a ceremonial or common law marriage existed between the DeMarchis, notwithstanding petitioner's contention that the necessary elements to establish a common law marriage are lacking, and under the authorities when two consecutive marriages are shown to have been contracted, either ceremonial or by law, the later marriage is presumed to be valid, under the presumption of the innocence of the parties entering into it. We think that theory of law is certainly applicable to the relationship of the DeMarchis. The mere fact that the first husband might still have been alive at the time the second marriage had been contracted by his former wife, and that no divorce was shown to have occurred, does not affect the presumption that the second marriage was valid. This presumption of innocence applies to common law marriages as well as other kinds. In 18 Ruling Case Law, title "Marriage", pp. 416, 417, the author says:

"The usual presumption of law is that a fact continuous in its nature, such as marriage, continues after its existence once shown, but the presumption in favor of the validity of a marriage attaches with full force to the latest marriage, and the presumption of the continuance of the first marriage, based upon the naked fact that it was solemnized, is not equal in probative force to the presumption in favor of the legality of the subsequent marriage. This is based on the doctrine that the presumption of innocence, morality and legitimacy will counterbalance and preponderate against the presumption of continuance of the former relations."

Petitioner's counsel argue, however, that cohabitation, when meretricious at its inception, continues so to be, in the absence of contrary evidence, and they cite a great many cases in support of this contention, which is based upon the premise that

> strong presumption in favor of its legality so that the burden is with the party objecting thereto, and in every particular, to prove, against the presumptions of the jurisdiction of law, that it is illegal and void. And it has been contended that the validity of a marriage cannot be tested like any other question of fact which is independent of presumption, because the law, besides casting the burden of proof upon the objecting party, will still presume in favor of the marriage, and this presumption increases in strength with the lapse of time through which the parties are cohabiting as husband and wife." (Bishop on Marriage and Divorce, sec. 457.)

In the case at bar the evidence conclusively establishes the fact that either a ceremonial or common law marriage existed between the Debarkins, notwithstanding petitioner's contention that the necessary elements to establish a common law marriage are lacking, and under the authorities where two consecutive marriages are shown to have been contracted, either ceremonial or by law, the later marriage is presumed to be valid, under the presumption of the innocence of the parties entering into it. We think that theory of law is certainly applicable to the relationship of the Debarkins. The mere fact that the first husband might still have been alive at the time the second marriage had been contracted by his former wife, and that no divorce was shown to have occurred, does not affect the presumption that the second marriage was valid. This presumption of innocence applies to common law marriages as well as other kinds. In 18 Ruling Case Law, title "Marriage", pp. 416, 417, the author says:

> "The usual presumption of law is that a fact continuous in its nature, such as marriage, continues after its existence once shown, but the presumption in favor of the validity of a marriage attaches with full force to the latest marriage, and the presumption of the continuance of the first marriage, based upon the mere fact that it was solemnized, is not equal in probative force to the presumption in favor of the legality of the subsequent marriage. This is based on the doctrine that the presumption of innocence, morality and legitimacy will counterbalance and preponderate against the presumption of continuance of the former relations."

Petitioner's counsel argue, however, that cohabitation, when meretricious at its inception, continues so to be, in the absence of contrary evidence, and they cite a great many cases in support of this contention, which is based upon the premise that

Carrie Hannan could not and did not enter into a marriage in 1891 or 1892 with DeMarchi because she had a husband then living, from whom she was undivorced, and if she entered into any relations with Michael DeMarchi her conduct in so doing was meretricious. Holding as we do that petitioner did not assume the burden imposed upon him by law of showing that Hannan was alive for more than seven years following his desertion in 1885, this argument is untenable. In Cartwright v. McGown, 121 Ill. 388, upon which petitioner principally relies, the court merely held that because of the peculiar facts there involved a common law marriage could not be presumed to have taken place after the removal of the legal impediment, because the evidence affirmatively proved the contrary, but the court affirmed the proposition (p. 404) that "cohabitation, in ignorance of facts rendering it illegal, is not to be regarded as meretricious and criminal until the parties had knowledge of such facts. Their purpose in such a union is an honorable marriage, which the law favors, and not mere illicit intercourse."

Petitioner's counsel argue that Carrie and Michael DeMarchi knew that Carrie was not divorced, but there is no evidence upon which to base this assertion; in fact, the record is rather convincing that she entered into the relationship with Michael in the best of faith. In Potter v. Clapp, 203 Ill. 592, a married man and a woman had attempted to contract an illegal ceremonial marriage, the first wife of the man not having obtained a divorce from him until two years after her husband had contracted his second marriage; nevertheless, the court said that it would be presumed, not only that the husband himself had also obtained a divorce, but also that he had done so before he contracted his second marriage, and that the continued cohabitation of the husband with his second wife after the impediment had been presumptively removed would be proof of a lawful

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Petitioner's counsel argue that Carrie and Michael DeMarchi knew that Carrie was not divorced, but there is no evidence upon which to base this assertion; in fact, the record is rather convincing that she entered into the relationship with Michael in the best of faith. In Potter v. Clapp, 208 Ill. 392, a married man and a woman had attempted to contract an illegal ceremonial marriage, the first wife of the man not having obtained a divorce from him until two years after her husband had contracted his second marriage; nevertheless, the court said that it would be presumed, not only that the husband himself had also obtained a divorce, but also that he had done so before he contracted his second marriage, and that the continued cohabitation of the husband with his second wife after the impediment had been presumptively removed would be proof of a lawful

marriage.

Petitioner argues that title to the property in controversy was in Michael DeMarchi at the time of his death. This contention is limited only to the personal property, because the real estate was held in joint tenancy and passed by operation of law to Carrie DeMarchi, who survived him. On this proposition it was likewise necessary for petitioner to affirmatively prove his right to the assets he was claiming. The defense set forth by respondent was that he had no property whatever belonging to the Michael DeMarchi estate and there is no evidence to the contrary. The record discloses that Carrie and Michael DeMarchi had worked together in all their business enterprises and kept their personal property in a joint deposit box, where it was found after their death. Moreover, the heirs of Michael DeMarchi agreed that all this property should be administered in the estate of Carrie DeMarchi. All their ventures were jointly conducted, with the single exception of the saloon business which Michael carried on for a period of time. The bulk of the personal property consisted of mortgage notes. These were payable to bearer, and upon the evidence in this case we think they rightfully belong to the estate of Carrie DeMarchi.

Various other legal questions are raised by counsel on both sides, but in view of the conclusions reached herein we deem it unnecessary to discuss them. The circuit court heard the case by stipulation upon the printed record made in the probate court. The probate judge had an opportunity to see and hear the witnesses and judge of their credibility, and we think his finding and judgment that the respondent, as administrator of the estate of Carrie DeMarchi, deceased, was the lawful owner of all the assets which form the subject of the controversy, is abundantly sustained by the evidence. The judgment of the circuit court is reversed.

JUDGMENT REVERSED.

Scanlan and Sullivan, JJ., concur.

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Petitioner argues that title to the property in controversy was in Michael DeMarcoh at the time of his death. This contention is limited only to the personal property, because the real estate was held in joint tenancy and passed by operation of law to Carrie DeMarcoh, who survived him. On this proposition it was likewise necessary for petitioner to affirmatively prove his right to the assets he was claiming. The defense set forth by respondent was that he had no property whatever belonging to the Michael DeMarcoh estate and there is no evidence to the contrary. The record discloses that Carrie and Michael DeMarcoh had worked together in all their business enterprises and kept their personal property in a joint deposit box, where it was found after their death. Moreover, the heirs of Michael DeMarcoh agreed that all this property should be administered in the estate of Carrie DeMarcoh. All their ventures were jointly conducted, with the single exception of the saloon business which Michael carried on for a period of time. The bulk of the personal property consisted of mortgage notes. These were payable to bearer, and upon the evidence in this case we think they rightfully belong to the estate of Carrie DeMarcoh.

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JUDGMENT REVERSED.

Scanlan and Sullivan, JJ., concur.

39333

EMILY BROSSEIT,
Appellee,

v.

AUGUST W. NIMTZ,
Appellant.

6A

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

295 I.A. 612[3]

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Emily Brosseit, plaintiff, brought an action for personal injuries alleged to have been sustained by her through a collision with an automobile driven by August W. Nimtz, defendant, as she was crossing Lincoln avenue, in Chicago between intersections. Trial was had by jury, resulting in a verdict of guilty and assessing plaintiff's damages at $3,000. The jury also returned a special finding answering in the affirmative an interrogatory as to whether defendant was "guilty of wilful, wanton and malicious conduct." After overruling motions for judgment notwithstanding the verdict, for a new trial, and in arrest of judgment, the court entered judgment on the verdict. This appeal followed.

The complaint alleged in substance that September 28, 1934, defendant was driving an automobile in a northerly direction on Lincoln avenue, at or near 4800 north; that plaintiff was crossing the street from east to west between intersections, and that she was at all times in the exercise of due care and caution for her own safety; that defendant negligently and carelessly drove his automobile in a northerly direction, striking her, in consequence whereof she was seriously and permanently injured; that defendant

29333

EMILY BROSSEAU,
Appellee,

v.

AUGUST W. MINTE,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

295 I.A. 612

MR. PRESIDING JUSTICE PRIMMER
DELIVERED THE OPINION OF THE COURT.

Emily Brosseau, plaintiff, brought an action for personal injuries alleged to have been sustained by her through a collision with an automobile driven by August W. Minte, defendant, as she was crossing Lincoln avenue, in Chicago between intersections. Trial was had by jury, resulting in a verdict of guilty and assessing plaintiff's damages at $3,000. The jury also returned a special finding answering in the affirmative an interrogatory as to whether defendant was "guilty of willful, wanton and malicious conduct." After overruling motions for judgment notwithstanding the verdict, for a new trial, and in arrest of judgment, the court entered judgment on the verdict. This appeal followed.

The complaint alleged in substance that September 28, 1924, defendant was driving an automobile in a northerly direction on Lincoln avenue, at or near 4800 north; that plaintiff was crossing the street from east to west between intersections, and that she was at all times in the exercise of due care and caution for her own safety; that defendant negligently and carelessly drove his automobile in a northerly direction, striking her, in consequence whereof she was seriously and permanently injured; that defendant

"did one or the other of the following acts which caused injuries to plaintiff": Carelessly and negligently drove his automobile at an excessive rate of speed, in accordance with the location, in violation of sec. 22 of the Motor Vehicle Act of this State, without keeping a proper outlook for pedestrians on the highway or sounding a horn or other signal of his approach, and that he "willfully and wantonly drove said automobile at an excessive rate of speed, in accordance with the location aforesaid."

The evidence discloses that the accident occurred September 28, 1934, at about two o'clock p.m., in front of 4745 Lincoln avenue, on the east side of the street. Lincoln avenue is one of the main thoroughfares extending through Chicago northwest and has two street car tracks along the center of the street. Giddings avenue is an east and west street south of Lawrence avenue, and about 150 feet south of the scene of the accident. On the day in question automobiles and trucks were parked close together on the east side of the street. Defendant was driving a Pontiac sedan north on Lincoln avenue, at a rate of speed varying from 15 to 35 miles an hour, according to the evidence, on the east rails used by north bound street cars. He testified that he was looking straight ahead and saw no one standing between the north and south bound car tracks. As he proceeded north he observed two trucks and a touring car parked on the east side of Lincoln avenue, several feet from the curb, and when he reached the center of the 4700 block a woman suddenly stepped out from between two of the trucks and ran in front of his car; that he "slammed on" the brakes and stopped his car; that when he first observed her she was only about five feet from his car, too late to avoid the accident.

Two of plaintiff's witnesses, Jeanne H. Liebman and Harry Liebman, her husband, testified they were seated in an automobile, double parked, on the west side of Lincoln avenue and north of the

"did one or the other of the following acts which caused injuries to plaintiff": Carelessly and negligently drove his automobile at an excessive rate of speed, in accordance with the location, in violation of sec. 22 of the Motor Vehicle Act of this State, without keeping a proper outlook for pedestrians on the highway or sounding a horn or other signal of his approach, and that he "willfully and wantonly drove said automobile at an excessive rate of speed, in accordance with the location aforesaid."

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Two of plaintiff's witnesses, Jeanne H. Liebman and Harry Liebman, her husband, testified they were seated in an automobile, double parked, on the west side of Lincoln avenue and north of the

scene of the accident, and both said that they saw defendant's car at Giddings street, the first intersection to the south; that plaintiff was standing in the east or north bound tracks, facing west, with a bag of groceries on her arm, waiting for the passage of a car headed south; that as defendant's car approached plaintiff took two steps forward toward the west and defendant's automobile simultaneously swerved to the west, but the right end of the bumper struck her and threw her to the pavement. Two other witnesses for plaintiff corroborated this evidence.

Plaintiff testified that when she came from the A. & P. store she stepped from the curb, passed between the two parked trucks and out onto the street car track. There is no evidence whatsoever by any witness that she looked either to her right or left, and none of plaintiff's witnesses could trace her movements after leaving the A. & P. store, and until she reached the car track, except Harry Liebman, who said that he saw her coming from the sidewalk on the north side of Lincoln avenue, saw her step into the street, but did not notice defendant's automobile until after she had been standing in the car track.

Because this case will have to be retried, we refrain from commenting on the details of the evidence. It is apparent, however, that plaintiff's allegation that she was at all times in the exercise of ordinary care for her own safety is not sustained by the evidence. Plaintiff's counsel argue, however, that under the finding of the jury in response to the special interrogatory that defendant was guilty of willful, wanton and malicious conduct, the question of contributory negligence becomes immaterial. This raises the question as to whether the complaint sufficiently charges wilful and wanton misconduct, and whether the evidence sustains such a finding and verdict. The issues are not complicated; nor are the controlling facts uncertain. It must

scene of the accident, and both said that they saw defendant's car at Giddings street, the first intersection to the south; that plaintiff was standing in the east or north bound tracks, facing west, with a bag of groceries on her arm, waiting for the passage of a car headed south; that as defendant's car approached plaintiff took two steps forward toward the west and defendant's automobile simultaneously swerved to the west, but the right end of the bumper struck her and threw her to the pavement. Two other witnesses for plaintiff corroborated this evidence.

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be conceded that plaintiff left the store in the center of the block on Lincoln avenue; that the street was lined with parked automobiles and trucks; that she emerged between two of these trucks, and in order to reach the point where the accident occurred she was obliged to pass between two trucks which obscured her until she emerged; that defendant's car was proceeding in its proper lane of travel, and, under the ordinances, had the right of way. It is also evident that defendant had his car under control, because he testified that he stopped his car within five or ten feet after the collision, and there is no countervailing proof. Plaintiff was unable to say whether she looked or took any precautions for her own safety before leaving the curb and after passing between the trucks to the street car tracks; she remembered nothing after leaving the A. & P. store. Upon this state of facts we are impelled to hold that the verdict and special finding that defendant was guilty of wilful and wanton conduct is contrary to the manifest weight of the evidence.

Defendant devotes considerable space in his brief to the argument that the complaint does not charge a wilful and wanton injury, alleging no facts showing either wilful conduct or constructive wilfulness, and that the instructions to the jury are subject to the criticism that the jury was permitted to find elements constituting wilfulness and wantonness which are not alleged in the complaint. There are also other criticisms of instructions given by the court. We assume, however, that these errors, if they were errors, will not be repeated.

For the reasons given the judgment of the Superior court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., concur.

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For the reasons given the judgment of the Superior court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., concur.

39632

LOUIS DEITCH,
Appellant,

v.

SAMUEL RUBENSTEIN,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

295 I.A. 612

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Louis Deitch, plaintiff, while employed as a crossing flagman by the Chicago Rapid Transit Company, was struck and injured by an automobile owned and operated by Samuel Rubenstein, the defendant, and suit was brought to recover damages for the injuries sustained. Trial by jury resulted in a verdict finding defendant not guilty, upon which the court, after overruling plaintiff's motion for a new trial, entered judgment in favor of defendant and against plaintiff for costs. Plaintiff appeals.

The accident occurred October 22, 1932, at about 6:30 o'clock in the evening, at the intersection of the tracks of the Chicago Rapid Transit Company with Harlem avenue, which at that point divides Oak Park and Forest Park. Harlem avenue runs north and south and is crossed by the east and westbound tracks of The Chicago Rapid Transit Company, which run at grade in a substantially east and west direction. These tracks are guarded by two pairs of crossing gates, one pair being south of the tracks and the other north. At a distance of about 60 feet south of the Chicago Rapid Transit Company's tracks are the tracks of the Baltimore & Ohio, Chicago Terminal Railroad Company, which cross Harlem avenue at grade. The tracks of the latter company at this point consist of an east and westbound track and run parallel with

39632

LOUIS DEITCH,
Appellant,

v.

SAMUEL RUBENSTEIN,
Appellee.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

295 I.A. 612

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DELIVERED THE OPINION OF THE COURT.

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The accident occurred October 22, 1932, at about 6:30 o'clock in the evening, at the intersection of the tracks of the Chicago Rapid Transit Company with Harlem avenue, which at that point divides Oak Park and Forest Park. Harlem avenue runs north and south and is crossed by the east and westbound tracks of The Chicago Rapid Transit Company, which run at grade in a substantially east and west direction. These tracks are crossed by two pairs of crossing gates, one pair being south of the tracks and the other north. At a distance of about 60 feet south of the Chicago Rapid Transit Company's tracks are the tracks of the Baltimore & Ohio, Chicago Terminal Railroad Company, which cross Harlem avenue at grade. The tracks of the latter company at this point consist of an east and westbound track and run parallel with

the tracks of the Chicago Rapid Transit Company. These tracks are likewise guarded by two pairs of crossing gates, one pair being south of the tracks and the other north.

Plaintiff was employed as a crossing flagman by the Chicago Rapid Transit Company, and his duties required him, upon the approach of a train over the tracks of his employer, to blow his whistle, go out in the center of the street and flag the traffic. On the day in question he was standing on the north side of the south east gate post, at the Chicago Rapid Transit Company's crossing. While standing in that position he saw a westbound train just leaving the Home avenue station, three blocks east of the Harlem avenue crossing. He thereupon went out onto the Rapid Transit crossing to flag the traffic on Harlem avenue in anticipation of the approaching train, and while on the crossing was struck by an automobile driven by defendant in a northerly direction on Harlem avenue, and was severely injured as a result of the impact.

Defendant had stopped for a traffic light at Garfield street, which is the first intersection south of and approximately 400 feet from the crossing. As he approached the tracks the gates were in the air. It was a dark and drizzly night, and although the crossing was well lighted defendant contends that he was unable to see plaintiff until such time as he suddenly appeared in front of the car, and that it was impossible to avoid hitting him. At the time of the impact plaintiff stood in the street, facing west or northwest, and held a lighted red lantern either in his hand or over the elbow of his right arm, which defendant says he could not see because the view of it was shut off by plaintiff's body. The evidence is conflicting as to the rate of speed at which defendant was traveling. Plaintiff testified that he blew a whistle, but defendant contends that he did not hear it, nor did he hear the crossing bell which was rung almost simultan-

the tracks of the Chicago Rapid Transit Company. These tracks are likewise guarded by two pairs of crossing gates, one pair being south of the tracks and the other north.

Plaintiff was employed as a crossing flagman by the Chicago Rapid Transit Company, and his duties required him, upon the approach of a train over the tracks of his employer, to blow his whistle, go out in the center of the street and flag the traffic. On the day in question he was standing on the north side of the south east gate post, at the Chicago Rapid Transit Company's crossing. While standing in that position he saw a westbound train just leaving the Lake avenue station, three blocks east of the Harlem avenue crossing. He thereupon went out onto the Rapid Transit crossing to flag the traffic on Harlem avenue in anticipation of the approaching train, and while on the crossing was struck by an automobile driven by defendant in a northerly direction on Harlem avenue, and was severely injured as a result of the impact.

Defendant had stopped for a traffic light at Garfield street, which is the first intersection south of and approximately 400 feet from the crossing. As he approached the tracks the gates were in the air. It was a dark and drizzly night, and although the crossing was well lighted defendant contends that he was unable to see plaintiff until such time as he suddenly appeared in front of the car, and that it was impossible to avoid hitting him. At the time of the impact plaintiff stood in the street, facing east or northwest, and held a lighted red lantern either in his hand or over the elbow of his right arm, which defendant says he could not see because the view of it was shut off by plaintiff's body. The evidence is conflicting as to the rate of speed at which defendant was travelling. Plaintiff testified that he blew a whistle, but defendant contends that he did not hear it, nor did he hear the crossing bell which was rung almost simulta-

eously with the occurrence of the accident, and, as he contends too late to constitute a warning.

It is urged as ground for reversal that the verdict of the jury and the judgment are against the manifest weight of the evidence, that the court erred in excluding competent evidence on behalf of plaintiff, and in admitting improper and prejudicial evidence offered by defendant, and that the court erred in giving improper instructions to the jury at the request of defendant, over plaintiff's objection. One of the instructions given to the jury at the request of defendant is as follows: "It was just as much the duty of the plaintiff to look out for and use ordinary care to avoid being injured on the occasion in question as it was the duty of the defendant to look out for and use ordinary care to avoid injuring the plaintiff. The defendant was not held in law to any higher degree of care than the plaintiff." It is argued that this instruction was misleading because it placed plaintiff and defendant on the same basis with reference to the care to be exercised, and overlooks the factual situation in the case. The undisputed evidence discloses that it was the duty of plaintiff to go out on the crossing and flag traffic, and it is argued that if ordinary care on the part of plaintiff were to be determined by the same standards as those applicable to an ordinary pedestrian, plaintiff would not have been able properly to perform his duties as a crossing flagman. He was required to go on the crossing, whether an ordinarily prudent person who had no such duty would have done so or not, and while there he had the right to assume that drivers of vehicles would take notice of him and exercise care not to injure him.

What constitutes ordinary care on the part of a person whose duty requires him to be in the street has been discussed in various decisions in Illinois and elsewhere.

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What constitutes ordinary care on the part of a person whose duty requires him to be in the street has been discussed in various decisions in Illinois and elsewhere.

In Beyrent v. Kaplan, 315 Pa. 353, plaintiff, a school janitor, who was acting as a traffic officer to protect children crossing the street, was struck by an automobile. Shortly after 3:30 p.m., on the day in question, while it was raining, he was standing in the center of the intersection in the performance of his duties as traffic officer, wearing a policeman's cap and badge and had a policeman's whistle, and was struck from behind by defendant's automobile. At the time of the accident he was looking in the opposite direction and did not see the approaching car. The court held that under the circumstances of that case the court erred in entering a compulsory nonsuit, and reversed the judgment with a procedendo. In discussing the question whether plaintiff was guilty of contributory negligence as a matter of law, the court said (pp. 355, 356):

> "He was not a pedestrian with no other care than his own safety, but was at work in the street, a fact which is properly to be considered in determining whether he was negligent. (Craven v. Pittsburgh Railways Co., 243 Pa. 619; Cecola v. Forty-four Cigar Co., 253 Pa. 623; C. Peters v. Schroeder, 290 Pa. 217.) Not only did he have a right to be where he was, in the center of the intersection, but it was his duty to be there to safeguard the children who were returning from school, some of whom were obliged to cross the street at this point. The school authorities deemed it necessary to station him there for that purpose. He was not, as a matter of law, required to keep a continual lookout to the north; he was entitled to assume, or at least the jury could reasonably find that he was entitled to assume, that the drivers of vehicles approaching from that direction would observe his presence and avoid him."

In Xenodochius v. Fifth Ave. Coach Co., 129 App. Div. 26, 113 N. Y. S. 135, a policeman attached to the traffic squad was held not guilty of contributory negligence, and a judgment in his favor was affirmed, where, while walking three or four feet to the left of the center of the street, on the way to the place where he was assigned, he was struck from behind by a vehicle traveling on the wrong side of the street. The court said that a person not engaged in the public service injured under such circumstances would be guilty of

In Bayrent v. Lapian, 218 N. 333, plaintiff, a school janitor, who was acting as a traffic officer to protect children crossing the street, was struck by an automobile. Shortly after 3:30 p.m., on the day in question, while it was raining, he was standing in the center of the intersection in the performance of his duties as traffic officer, wearing a policeman's cap and badge and had a policeman's whistle, and was struck from behind by defendant's automobile. At the time of the accident he was looking in the opposite direction and did not see the approaching car. The court held that under the circumstances of that case the court erred in entering a compulsory nonsuit, and reversed the judgment with a procedendo. In discussing the question whether plaintiff was guilty of contributory negligence as a matter of law, the court said (pp. 333, 336):

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In Xenodochine v. Fifth Ave. Coach Co., 129 Misc. Rep. 26, 218 N. Y. S. 133, a policeman attached to the traffic squad was held not guilty of contributory negligence, and a judgment in his favor was affirmed, where, while walking three or four feet to the left of the center of the street, on the way to the place where he was assigned, he was struck from behind by a vehicle travelling on the wrong side of the street. The court said that a person not engaged in the public service injured under such circumstances would be guilty of

negligence, but that a different rule applied in the case of persons engaged upon the street; that the duties of the plaintiff were to regulate traffic in the street, where his presence was required; that he might have exercised a greater degree of caution and avoided the accident, but that he was not called upon to exercise the care that would be required of a stranger; that he had a right to assume that persons driving in the street would know that officers were there whose duty it was to regulate traffic, and that those approaching from the north would keep to the right; that he was only required to exercise the degree of caution that might be expected of an officer engaged in such duty.

In Fitzsimons v. Isman, 166 App. Div.,262, 151 N. Y. S. 552 (affirmed in 219 N. Y. 610), a police officer, while performing his duty was run into and killed by an automobile, and the court held that while he was undoubtedly required, in view of the work assigned to him, to use reasonable care to prevent being run over, that he was not obliged to use the same degree of care that would be required of an ordinary pedestrian; the court stating that the rule to be applied, in view of the work which he was doing, was similar to that applied to persons who are employed by a municipality to work upon the public streets.

In Leoni v. McMillan, 287 Ill. App. 579, we had occasion to pass upon the duty of the driver of a truck on a public highway who struck and fatally injured plaintiff's intestate, who was employed as a workman in constructing drainage ditches along a highway north of the Village of Maywood, and held that drivers of vehicles must take notice of men working on the highway and to exercise care not to injure them, and that a workman has a right to assume that this will be done. Citing Nehring v. Monroe Stationary Co. (Mo. App.) 191 S. W. 1054; Carneghi v. Gerlach, 208 Ill. App. 340.

negligence, but that a different rule applied in the case of persons engaged upon the street; that the duties of the plaintiff were to regulate traffic in the street, where his presence was required; that he might have exercised a greater degree of caution and avoided the accident, but that he was not called upon to exercise the care that would be required of a stranger; that he had a right to assume that persons driving in the street would know that officers were there whose duty it was to regulate traffic, and that those approaching from the north would keep to the right; that he was only required to exercise the degree of caution that might be expected of an officer engaged in such duty.

In Whitehouse v. Lemon, 108 App. Div., 862, 191 N. Y. S. 552 (affirmed in 230 N. Y. 620), a police officer, while performing his duty was run into and killed by an automobile, and the court held that while he was undoubtedly required, in view of the work assigned to him, to use reasonable care to prevent being run over, that he was not obliged to use the same degree of care that would be required of an ordinary pedestrian; the court stating that the rule to be applied, in view of the work which he was doing, was similar to that applied to persons who are employed by a municipality to work upon the public streets.

In Leonf v. McAllen, 287 Ill. App. 379, we had occasion to pass upon the duty of the driver of a truck on a public highway who struck and fatally injured plaintiff's intestate, who was employed as a workman in constructing drainage ditches along a highway north of the village of Maywood, and held that drivers of vehicles must take notice of men working on the highway and to exercise care not to injure them, and that a workman has a right to assume that this will be done. Citing Martin v. Monroe Stationery Co. (Mo. App.) 191 S. W. 1054; Cornwell v. Gerlach, 208 Ill. App. 340.

In Louisville R. Co. v. Offutt, 246 Ky. 508, it was held that the question of contributory negligence was for the jury where a traffic officer was struck by a bus as he stepped from a concrete safety platform used by street railway busses, in an attempt to stop an automobile which was wrongfully being driven on the inside of the safety zone. Counsel there argued that it was the officer's duty to direct the traffic and to be on the lookout for approaching busses or cars; that he stepped immediately in front of the bus without making any effort to learn of its approach, and that the case was analogous to that of a foreman or track walker who was generally denied a recovery, but the court pointed out that an examination of such cases showed that a recovery was denied upon the ground that it was the duty of the injured employee to be on the lookout for passing trains, and for that reason he was not entitled to a lookout or warning of the train's approach, but that in the case at bar the situation was altogether different; that the officer was not employed by the railroad company to be on the lookout for an occasional bus or street car operating on a fixed schedule; that on the contrary he was employed by the city to direct the traffic; that he was at a place where busses and street cars and other motor vehicles were constantly going and coming; that in the very nature of things he could not direct the traffic and look after the traveling public without having his attention diverted from approaching busses, and that for this reason the driver of the bus owed him the same warning, the same lookout, and the same speed that he owed to any one else at the place of the accident, and that he had a right to assume that this duty would be performed.

In King v. Green, 7 Cal. App. 473, 94 Pac. 777, the court, in discussing the question of contributory negligence on the part of a laborer working in the streets, said (pp. 476-477):

"Had a pedestrian with no occupation requiring his presence

In Louisville R. Co. v. Offutt, 226 Ky. 108, it was held that the question of contributory negligence was for the jury where a traffic officer was struck by a bus as he stepped from a concrete safety platform used by street railway passes, in an attempt to stop an automobile which was wrongfully being driven on the inside of the safety zone. Counsel there argued that it was the officer's duty to direct the traffic and to be on the lookout for approaching passes or cars; that he stepped immediately in front of the bus without making any effort to learn of its approach, and that the case was analogous to that of a foreman or track walker who was generally denied a recovery, but the court pointed out that an examination of such cases showed that a recovery was denied upon the ground that it was the duty of the injured employee to be on the lookout for passing trains, and for that reason he was not entitled to a lookout or warning of the train's approach, but that in the case at bar the situation was altogether different; that the officer was not employed by the railroad company to be on the lookout for an occasional bus or street car operating on a fixed schedule; that on the contrary he was employed by the city to direct the traffic; that he was at a place where passes and street cars and other motor vehicles were constantly going and coming; that in the very nature of things he could not direct the traffic and look after the traveling public without having his attention diverted from approaching passes, and that for this reason the driver of the bus owed him the same warning, the same lookout, and the same speed that he owed to any one else at the place of the accident, and that he had a right to assume that this duty would be performed.

In King v. Green, 7 Cal. App. 475, 94 Pac. 777, the court, in discussing the question of contributory negligence on the part of a laborer working in the street, said (pp. 476-477):

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in that part of the street devoted to the use of vehicles, been struck by a passing vehicle while he was backing along the roadway without looking to see where he was going, it is clear that he would have been guilty of contributory negligence. (Niosi v. Empire Laundry Co., 117 Cal. 260, 49 Pac. 185.) But the rights of a laborer whose duties require him to be in the roadway cannot be determined by the same rule. Not that he is bound to exercise any less care, but because the care to be exercised must be determined from a different standpoint."

From these various decisions, and others cited and discussed in 92 A. L. R. 1518, we take it to be the law that persons engaged upon the street, either as workmen, police officers or employees required to regulate traffic, whose presence is required in the street, are, of course, bound to exercise care and caution for their own safety, but they are required to exercise only that degree of caution that might be expected of a person engaged in such duty. What is reasonable care depends on the facts and circumstances, of which the jury, under proper instructions, are to be the judges. (Chicago, Burlington & Quincy Railroad v. Pollock, 195 Ill. 156.) We are of the opinion that the instruction complained of is not in conformance with the established rule of law. It is misleading and might well have produced the verdict in favor of defendant. Because the instruction deals with the question of negligence and contributory negligence, which constitute the basis of plaintiff's right to recover, it was of vital importance that the jury should have been correctly and carefully charged.

Inasmuch as the cause will probably be retried, we refrain from commenting on the credibility of witnesses and the weight of the evidence. Such errors as may have occurred on the admissibility or rejection of evidence, relating to the Workmen's Compensation act and the testimony of physicians as to certain X-ray photographs taken but not introduced in evidence, and in the giving or refusal of other instructions, will in all likelihood not be repeated upon the retrial. The judgment of the Superior court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., Concur.

in that part of the street devoted to the use of vehicles, been struck by a passing vehicle while he was backing along the roadway without looking to see where he was going, it is clear that he would have been guilty of contributory negligence. (Ilgat v. Empire Laundry Co., 117 Cal. 290, 49 Pac. 188.) But the rights of a laborer whose duties require him to be in the roadway cannot be determined by the same rule. Not only he is bound to exercise any less care, but because the care to be exercised must be determined from a different standpoint.

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Inasmuch as the cause will probably be retried, we refrain from commenting on the credibility of witnesses and the weight of the evidence. Such errors as may have occurred on the admissibility or rejection of evidence, relating to the defendant's compensation act and the testimony of physicians as to certain x-ray photographs taken but not introduced in evidence, and in the giving or refusal of other instructions, will in all likelihood not be repeated upon the retrial.

The judgment of the superior court is reversed and the cause remanded.

Scanlan and Sullivan, JJ., concur.

THE MOTION FOR A REHEARING AND CERTIFICATE FOR APPEAL.

39737

JOHN MOURIN,
Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

295 I.A. 613

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Peter Mourin, also known as Peter Morin, was employed by the Great Northern Railway Company as a section-hand and was insured under a group insurance policy issued by the Metropolitan Life Insurance Company, defendant. Under the certificate of insurance issued to him, his brother, John, plaintiff herein, was designated as beneficiary. On September 2, 1935, Peter was struck by a Great Northern Railway Company freight train and on September 22, 1935, he died from the injuries sustained. His brother, John, as beneficiary, brought an action under the double indemnity provisions of the policy, and pursuant to a trial by jury recovered judgment against defendant in the sum of $1,029.78 and costs, from which this appeal is taken by defendant.

Plaintiff's statement of claim alleges that while the policy was in full force and effect Peter Mourin was accidentally struck by a railroad train near the town of Hibbing, Minnesota, and as a result of the injuries, and solely through violent, external means, and directly and independently of all other causes, died as a result thereof; that defendant has paid the sum of $1,000 on account of the death, and that suit is brought for the additional $1,000 under the

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Plaintiff's statement of claim alleges that while the policy was in full force and effect Peter Mourin was accidentally struck by a railroad train near the town of Hibbing, Minnesota, and as a result of the injuries, and solely through violent, external means, and directly and independently of all other causes, died as a result thereof; that defendant has paid the sum of $1,000 on account of the death, and that suit is brought for the additional $1,000 under the

provisions of the policy providing for double indemnity.

The affidavit of defense admits that the certificate of insurance had issued to Peter Mourin; sets forth the provisions of the policy with reference to double indemnity payment; avers that the policy does not cover accident, injury, death, or other loss, caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity, or by medical or surgical treatment thereof, nor by self-destruction or self-inflicted injury, while sane or insane; and it is averred that the death of Peter Mourin was caused wholly or partly or directly or indirectly by disease or bodily or mental infirmity, and that his death was brought about by a temporarily deranged drunken condition or by self-destruction or self-inflicted injury, and therefore the defendant denies liability under the double indemnity provision of the policy.

Before the taking of any evidence upon the hearing, defendant moved to strike from its affidavit of merits the defense that Mourin's death was caused by "self-destruction or self-inflicted injury," and the cause proceeded to trial upon the affidavit of merits as modified.

It appears from the evidence that Mourin worked as a section-hand on the tracks of the Great Northern Railway Company near Hibbing, Minn. He lived in a shack or car near the railroad tracks at Leetonia, which is about two miles from the center of downtown Hibbing. On September 2, 1935, which was Labor day, he worked until approximately 10:30 in the morning, and had the rest of the day to himself. He spent the afternoon in town purchasing supplies and groceries, and was last seen at about 7 p.m., apparently sober and in a happy frame of mind. In order to reach his home in Leetonia, it was necessary for him to walk a distance of approximately five or six blocks along the railroad right of way to a point directly across from his home and then to cross the double set of tracks in order to enter his cottage or shack. The

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It appears from the evidence that Mourin worked as a section-hand on the tracks of the Great Northern Railway Company near Ribbing Mine. He lived in a shack or car near the railroad tracks at Bestonia which is about two miles from the center of downtown Ribbing. On September 2, 1938, which was Labor day, he worked until approximately 10:30 in the morning, and had the rest of the day to himself. He spent the afternoon in town purchasing supplies and groceries, and was last seen at about 7 p.m., apparently sober and in a happy frame of mind. In order to reach his home in Bestonia, it was necessary for him to walk a distance of approximately five or six blocks along the railroad right of way to a point directly across from his home and then to cross the double set of tracks in order to enter his cottage or shack. The

groceries which he had purchased consisted of meat, bread and eggs, which he carried in three separate packages. At about 8:20 o'clock that evening, an ore train consisting of a locomotive tender and forty loaded ore cars, as well as a caboose attached to the rear of the train, was travelling west on the south, or left side of the double track. Mourin was struck by that train directly in front of his home, and his body was found between the ninth and tenth ore cars. His right arm had been severed and was lying between the rails, while his body lay between the two sets of tracks. The eggs, bread and meat were scattered about his body. He was taken to a hospital and died September 22, 1935. The only eyewitnesses to the accident were some members of the train crew. Others who testified came to the scene of the accident after the train had stopped.

Andrew Berlinger, who was employed as fireman on the train in question, testified on behalf of defendant that he was sitting on the left hand side of the cab, looking straight ahead. By means of the headlights he first observed an object that "looked like a bunch of paper between the rails. When we got close to it and I seen the head moving and I then realized it was a man. He was sitting down stooped over forward so you could see the back rim of his hat. His head was about a foot and a half above the ground. He was facing east. *** Prior to the time of the accident no signal had been given since we left the Kerr-Mahoning crossing *** three-quarters of a mile from the scene of the accident ***. We were going between 15 and 20 miles per hour."

James LaDuke, the engineer, testified that by means of the headlight he could see about 8,000 to 10,000 feet ahead of the locomotive, but that he did not realize that a man was sitting on the track until the engine was approximately 500 feet from where plaintiff was struck. He stated that Mourin was sitting on the tracks,

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Andrew Darlinger, who was employed as fireman on the train in question, testified on behalf of defendant that he was sitting on the left hand side of the cab, looking straight ahead. By means of the headlights he first observed an object that "looked like a bunch of paper between the rails. When we got close to it and I seen the head moving and I then realized it was a man. He was sitting down stooped over forward so you could see the back rim of his hat. His head was about 1 foot and a half above the ground. He was facing east. *** Prior to the time of the accident no signal had been given since we left the Morrison-Knudsen crossing *** three-quarters of a mile from the scene of the accident ***. We were going between 15 and 20 miles per hour."

James Lahnke, the engineer, testified that by means of the headlight he could see about 8,000 to 10,000 feet ahead of the locomotive, but that he did not realize that a man was sitting on the track until the engine was approximately 300 feet from where plaintiff was struck. He stated that Mourin was sitting on the tracks,

with his head in his hands and his arms crosswise in front of him resting on his knees, but that it was not until he saw his head bob slightly that he realized it was a human being. "He appeared to be two feet high the way he was sitting. He was a frail thin man. I was about 200 feet from him when the brakes started to take effect to stop the train. He made no motion or any movement between the time I saw him and the time I hit him other than he moved his head. He made a motion of two or three inches up and down. He wore a hat. It was dark. He had a jacket on."

There is no evidence to explain why Mourin had decided to sit down between the tracks and defendant's counsel argue that "the only logical explanation which can be advanced for his strange actions is either drunkenness or suicide." Inasmuch as the defense of suicide had been eliminated from the case, the only remaining theory of defense is that Mourin was under the influence of liquor, and it is urged that plaintiff had the burden of proving that death was the result, directly and independently of all other causes, of bodily injuries sustained solely through violent, external and accidental means, and was not caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity, and that plaintiff failed to meet this burden imposed upon him as a condition precedent to recovery. There is evidence that Mourin had some beer at Leetonia before proceeding home, and two members of the train crew testified that his breath smelled of liquor, but there is no evidence that he had anything to drink except beer that afternoon or evening, or that he was intoxicated. Defendant indulges in a great deal of speculation as to the reason for Mourin's presence on the track, and notwithstanding the elimination of the defense of suicide or self-destruction, counsel still argue that Mourin was either so drunk as to cause bodily or mental infirmity or that he intended to commit suicide. They say that "it is quite likely that about the only amusement Peter Mourin

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had was his drinking, and it is entirely reasonable to believe that he, being unmarried and with no relatives who apparently cared anything about him, since his brother, the plaintiff, had not seen him for twelve years, decided it was not worth while to continue working as a section-hand. This idea might have been brought to mind by drinking. The mere fact that some of the plaintiff's evidence showed that he was of a happy disposition does not prove that at the time he was sitting between the tracks he was still of that disposition. ***" Since defendant caused the theory of suicide or self-destruction to be eliminated from its affidavit of merits, it can no longer be heard to urge that defense.

The only remaining theory is that at the time of the accident Mourin was sitting in a drunken and stupefied condition and unable to rise from his crouched position on the tracks and thus prevent being struck by the train. However, the evidence does not sustain this contention, and the conclusion is reached by pure speculation. If defendant had desired to make drunkenness on the part of the assured an exception to recovery under the policy, it would have been a simple matter to have inserted such a provision in the contract and to have stated that no recovery would be permitted in the event of accident, injury or death brought about as the result of drunkenness. Defendant wrote the contract and could easily have inserted provisions that would have avoided or averted the possibility of recovering on the theory that plaintiff had lost the use of his bodily and mental faculties because of intoxication. In Vollrath v. Center Life Insurance Co., 243 Ill. App. 181, the court discussed this doctrine, and said (p. 186): "It [the insurance company] not only wrote the language but when written it knew the trend of decision of this state on the probable points of controversy that might grow out of it. It might be unwilling to yield to the doctrine of the decisions, but it could provide the contract with terms that would avoid or avert it."

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Plaintiff made a prima facie case of death of the insured by external, violent and accidental means, and it was then incumbent upon defendant to show that the death resulted from an excepted cause other than suicide, that defense having been waived by striking it from the affidavit of merits. It was so held in the case of Nalty v. Federal Casualty Co., 245 Ill. App. 180, wherein the court (p. 185) said: "When appellee made a prima facie case of death from external, violent and accidental means the burden was then upon appellant to show that the death resulted from an excepted cause. (14 R. C. L. 1437; General Accident, Fire & Life Assur. Corp. v. Hymes, 77 Okla. 20, 185 Pac. 1085, 8 A. L. R. 318; Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 166 N. W. 363, 168 N. W. 884, 3 A. L. R. 1295,)" and other cases cited.

The remaining ground urged fornreversal is that the jury were erroneously instructed. The charge particularly criticized is as follows: "If you believe from a preponderance of the evidence that the insured at and before the time of the injury was not in the exercise of due care for his own safety and was negligent or careless and voluntarily and intentionally was upon the right of way of the railroad, and if you further believe from a preponderance of the evidence that as a result directly and independently of all other causes he sustained bodily injuries solely through violent, external and accidental means that resulted in his death, you are instructed that the plaintiff should nevertheless recover under the policy, unless you believe from the evidence that disease or mental or bodily infirmity contributed to the accident."

It is argued that there was no issue of negligence in the case, and that although the evidence clearly showed negligence on the part of the insured, this instruction injected into the case an issue which was not before the court and had a tendency to mislead the jury;

Plaintiff made a prima facie case of death of the insured by external, violent and accidental means, and it was then incumbent upon defendant to show that the death resulted from an excepted cause other than suicide, that a force having been waived by admitting it from the affidavit of suicide. It was so held in the case of Kelly v. Federal Casualty Co., 245 Ill. pp. 185, wherein the court (p. 188) said: "When appellee made a prima facie case of death from external, violent and accidental means the burden was then upon appellant to show that the death resulted from an excepted cause. (14 R. C. L. 1457; General Accident, Fire & Life Assur. Corp. v. Lyman, 77 Ohio, 20, 165 N. E. 1088, 8 A. L. R. 318; Lickleider v. Iowa State Traveling Men's Assn, 184 Iowa 423, 168 N. W. 365, 1 A. L. R. 1295.)" and other cases cited.

The remaining ground urged forwarded in that the jury were erroneously instructed. The charge particularly criticized is as follows: "If you believe from a preponderance of the evidence that the insured at and before the time of the injury was not in the exercise of due care for his own safety and was negligent or careless and voluntarily and intentionally was upon the right of way of the railroad, and if you further believe from a preponderance of the evidence that as a result directly and independently of all other causes he sustained bodily injuries solely through violent, external and accidental means that resulted in his death, you are instructed that the plaintiff should nevertheless recover under the policy, unless you believe from the evidence that disease or mental or bodily infirmity contributed to the accident."

It is argued that there was no issue of negligence in the case, and that although the evidence clearly showed negligence on the part of the insured, this instruction injected into the case an issue which was not before the court and had a tendency to mislead the jury;

also that in attempting to sum up the entire case the court omitted certain material portions of the evidence. As to the latter objection, we find that the instructions constituted one connected body or series, and the portions which defendant argues were omitted from the foregoing instruction were included and repeated in other parts of the instruction given by the court. Inasmuch as the defendant offered testimony relating to the noise of the train as it approached, the visibility of its headlight and the fact that deceased by reason of his employment was fully aware of the dangers in walking the tracks, it was not improper for the court to charge the jury on the question of negligence. Defendant injected that issue in the case by its own testimony, and its counsel argue that plaintiff had ample time to get out of the way of the train. Obviously the only purpose of this testimony and argument was to show that Mourin was himself guilty of negligence, and unless the court had instructed the jury that his negligence did not constitute a defense under the terms of the policy, the jury would have been justified in reaching the conclusion that Mourin was guilty of negligence, and might have improperly rendered a verdict against plaintiff on that issue. In Costello v. Federal Life Ins. Co., 259 Ill. App. 321, an action was brought upon a policy of insurance having similar provisions, and the evidence showed that the assured attempted to board a street car which was then travelling at 15 or 20 miles an hour. He was thrown or fell from the car and sustained a skull fracture from which he died. It was there contended that "there was no injury by accidental means," and in discussing the question the court held that carelessness or negligence was no defense, citing Fidelity & Casualty of N. Y. v. Morrison, 129 Ill. App. 360; Heller v. International Indemnity Co., 238 Ill. App. 361, and other decisions. The defendant in that case sought to convince the jury that drunkenness of the deceased was

also that in attempting to sum up the entire case the court omitted certain material portions of the evidence. As to the latter objection, we find that the instructions constituted one connected body or series, and the portions which defendant argues were omitted from the foregoing instruction were included and repeated in other parts of the instruction given by the court. Inasmuch as the defendant offered testimony relating to the noise of the train, as it approached the viaduct, the visibility of its headlight and the fact that deceased by reason of his employment was fully aware of the dangers in walking the tracks, it was not improper for the court to charge the jury on the question of negligence. Defendant injected that issue in the case by its own testimony, and its counsel argue that plaintiff had ample time to get out of the way of the train. Obviously the only purpose of this testimony and argument was to show that Mounin was himself guilty of negligence, and unless the court had instructed the jury that his negligence did not constitute a defense under the terms of the policy, the jury would have been justified in reaching the conclusion that Mounin was guilty of negligence, and might have improperly rendered a verdict against plaintiff on that issue. In Costello v. Federal Life Ins. Co., 259 Ill. App. 321, an action was brought upon a policy of insurance having similar provisions, and the evidence showed that the assured attempted to board a street car which was then travelling at 15 or 20 miles an hour. He was thrown or fell from the car and sustained a skull fracture from which he died. It was there contended that "there was no injury by accidental means," and in discussing the question the court held that carelessness or negligence was no defense, citing Fidelity & Casualty of N. Y. v. Morrison, 129 Ill. App. 300; Keller v. International Indemnity Co., 238 Ill. App. 321, and other decisions. The defendant in that case sought to convince the jury that drunkenness of the deceased was

covered by the policy under the provision "bodily or mental infirmity," but the court would not permit the introduction of evidence relating to the alleged drunken condition of the person injured.

After a careful reading of the record we have reached the conclusion that there was no evidence from which the jury would have been justified in finding that Mourin was suffering from any infirmities mentioned in the policy, and that the evidence sustains the allegations of the complaint that Mourin's death was effected through accidental means, as alleged. Therefore, the judgment of the municipal court is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

covered by the policy under the provision "bodily or mental infirmity," but the court would not permit the introduction of evidence relating to the alleged diseased condition of the person injured.

After a careful reading of the record we have reached the conclusion that there was no evidence from which the jury could have been justified in finding that Martin was suffering from any infirmities mentioned in the policy, and that the evidence establishes the allegations of the complaint that Martin's death was effected through accidental means, as alleged. Therefore, the judgment of the municipal court is affirmed.

AFFIRMED.

Sanborn and Baldwin, JJ., concur.

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SAMUEL G. CURREY,
Appellee,

v.

EMMETT B. BLACKWELL, Sr.,
and ANNIE BLACKWELL, his
wife, et al.,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

295 I.A. 613

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Samuel G. Currey filed a complaint to foreclose a trust deed executed by James H. Blackwell, deceased, securing an indebtedness of $3,000, which had been reduced by reason of payments on account of principal to $1,200. Blackwell'e heirs were made parties defendant to the complaint, and in due course filed their answer and a counterclaim, joining Smart & Golee, Inc., a real estate firm who negotiated the loan and managed the property for four years prior to the foreclosure, and Christian J. Golee, trustee, as defendants. The matter was referred to a master, who found against the defendants and recommended a decree of foreclosure in favor of plaintiff. Exceptions to the master's report by the defendants were overruled, and a decree was entered in conformity with the master's recommendations, from which the defendants appealed.

The essential facts disclose that James H. Blackwell owned a parcel of real estate in Evanston, Illinois, improved with a one-story frame residence and a two-apartment brick building. On November 10, 1926, he negotiated a loan with Smart & Golee, Inc., of Evanston for $3,000, evidenced by a note and secured by the trust deed sought to be foreclosed. Shortly after executing the note

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SAMUEL G. GURNEY,
Appellee,

v.

EMMETT H. BLACKWELL, et al.,
and ANNIE BLACKWELL, his
wife, et al.,
Appellants.

APPEAL FROM WINNEBAGO COUNTY,

COOK COUNTY.

295 I.A. 613

MR. PRESIDING JUSTICE TRADER
DELIVERED THE OPINION OF THE COURT.

Samuel G. Gurney filed a complaint to foreclose a trust deed executed by James H. Blackwell, deceased, securing an indebtedness of $3,000, which had been reduced by reason of payments on account of principal to $1,200. Blackwell's heirs were made parties defendant to the complaint, and in one course filed their answer and a counterclaim, joining Smart & Golee, Inc., a real estate firm who negotiated the loan and managed the property for four years prior to the foreclosure, and Christian J. Golee, trustee, as defendants. The matter was referred to a master, who found against the defendants and recommended a decree of foreclosure in favor of plaintiff. Exceptions to the master's report by the defendants were overruled, and a decree was entered in conformity with the master's recommendations, from which the defendants appeal.

The essential facts disclose that James H. Blackwell owned a parcel of real estate in Evanston, Illinois, improved with a one-story frame residence and a two-apartment brick building. On November 10, 1926, he negotiated a loan with Smart & Golee, Inc., of Evanston for $3,000, evidenced by a note and secured by the trust deed sought to be foreclosed. Shortly after executing the note

and mortgage Blackwell died, and his heirs paid the interest due from time to time and reduced the principal from $3,000 to $1,200. Within a month after the trust deed and note were executed, Smart & Golee, Inc., sold the same to Samuel G. Currey, plaintiff herein, who paid therefor the sum of $3,013.50, as evidenced by his check dated December 8, 1926, drawn on the State Bank & Trust Company, of Evanston, Illinois, and payable to Smart & Golee, Inc.

Shortly before the maturity of the unpaid principal, on November 10, 1931, one of the Blackwell heirs called on Smart & Golee, Inc., in Evanston, and requested an extension for three years. The extension was granted, upon condition that defendants would pay $90 for matured interest, $75 for an extension fee, and $500 on account of principal. These sums were paid by defendants, and at the same time a written assignment of rents was given Smart & Golee, Inc., under which it managed the property from November 10, 1931, until October, 1935. When the foreclosure complaint was filed, the $1,200 remaining due as principal had matured, and there was a default in the payment of interest for more than a year.

Defendants filed an answer to the complaint, as well as a counterclaim wherein they averred in substance that Currey was not the holder and owner of the note; that Smart & Golee, Inc., had represented to the heirs at the time the extension was made that it was the owner and holder thereof, and that the assignment of rents was given with the understanding that the net rentals should be applied toward payment of the remaining principal and interest; that in the period of four years during which Smart & Golee, Inc., collected the rents and managed the property, various tenants were allowed to remain in possession without the payment of rent, and that if the property had been managed with reasonable diligence and care there

and mortgage Blackwell died, and his heirs paid the interest due from time to time and reduced the principal from $3,000 to $1,200. Within a month after the trust deed and note were executed, Smart & Gates, Inc., sold the same to Samuel G. Gurney, plaintiff herein, who paid therefor the sum of $3,018.80, as evidenced by his check dated December 8, 1926, drawn on the State Bank & Trust Company, of Evanston, Illinois, and payable to Smart & Gates, Inc.

Shortly before the maturity of the unpaid principal, on November 10, 1931, one of the Blackwell heirs called on Smart & Gates, Inc., in Evanston, and requested an extension for three years. The extension was granted, upon condition that defendants could pay $90 for matured interest, $72 for an extension fee, and $300 on account of principal. These sums were paid by defendants, and at the same time a written agreement of rents was given Smart & Gates, Inc., under which it managed the property from November 10, 1931, until October, 1933. When the foreclosure complaint was filed, the $1,800 remaining due on principal had matured, and there was a default in the payment of interest for more than a year.

Defendants filed an answer to the complaint, as well as a counterclaim wherein they averred in substance that Gurney was not the holder and owner of the note; that Smart & Gates, Inc., had represented to the heirs at the time the extension was made that it was the owner and holder thereof, and that the assignment of rents was given with the understanding that the net rentals should be applied toward payment of the remaining principal and interest; that in the period of four years during which Smart & Gates, Inc., collected the rents and managed the property, various tenants were allowed to remain in possession without the payment of rent, and that if the property had been managed with reasonable diligence and care there

would have been enough available from the net rentals to have paid the entire principal and interest. It is averred in the answer and counterclaim that Smart & Golee, Inc., and Christian J. Golee, the trustee, entered into a conspiracy by which they allowed tenants to remain in possession without the payment of rent so that there would be nothing available with which to pay interest and the principal indebtedness, and thus to secure the property for themselves and Currey, the plaintiff. The counterclaim joined Smart & Golee, Inc., and Christian F. Golee, trustee, as defendants, and Golee filed his answer denying the averments of the counterclaim. The decree of foreclosure is absolutely silent as to the issues made up by the counterclaim and answer thereto, and makes no adjudication as to the affirmative relief sought by defendants in their counterclaim.

It is first urged as ground for reversal that a material alteration was made in the trust deed after it was executed by James H. Blackwell, rendering the instrument void. The alteration charged appears on the first page of the instrument, and refers to the principal note for $3,000. The instrument reads as follows: "Said principal note being for the sum of Three Thousand and no/100 ($3,000) Dollars, due and payable five (5) years after the date thereof." A red line was apparently drawn through the words, "Due and payable five (5) years after date," and subsequently erased, but plaintiff's witnesses testified that the note is in the same condition now as it was before Blackwell's signature was attached thereto, and the master and court so found. From an examination of the instrument and the evidence bearing upon the question, it seems reasonably clear that when the red line was drawn through the due date of the note it was done by inadvertence, and afterward erased. Moreover, the defense of alteration is not set forth in any of the pleadings, and was made for the first time before the master. Under the plain provisions of

would have been enough available from the net rentals to have paid the entire principal and interest. It is averred in the answer and counterclaim that Smart & Dolee, Inc., and Christian F. Dolee, the trustee, entered into a conspiracy by which they allowed tenants to remain in possession without the payment of rent so that there would be nothing available with which to pay interest and the principal indebtedness, and thus to secure the property for themselves and Gurney, the plaintiff. The counterclaim joined Smart & Dolee, Inc., and Christian F. Dolee, trustee, as defendants, and Dolee filed his answer denying the averments of the counterclaim. The decree of foreclosure is absolutely silent as to the issues made up by the counterclaim and answer thereto, and makes no adjudication as to the affirmative relief sought by defendants in their counterclaim.

It is first urged as ground for reversal that a material alteration was made in the trust deed after it was executed by James K. Flickell, rendering the instrument void. The alteration charged appears on the first page of the instrument, and refers to the principal note for $3,000. The instrument reads as follows: "Said principal note being for the sum of three thousand and no/100 ($3,000) Dollars, due and payable five (5) years after the date thereof." A red line was apparently drawn through the words, "five and payable five (5) years after date," and subsequently erased, but plaintiff's witnesses testified that the note is in the same condition now as it was before Flickell's signature was attached thereto, and the master and court so found. From an examination of the instrument and the evidence bearing upon the question, it seems reasonably clear that when the red line was drawn through the due date of the note it was done by inadvertence, and afterward erased. Moreover, the defense of alteration is not set forth in any of the pleadings, and was made for the first time before the master. Under the plain provisions of

the Civil Practice act, affirmative defenses, such as fraud, illegality, or that the instrument or transaction is either void or voidable in point of law, which would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. (Par. 164, sec. 40, subsec. (3); par. 167, sec. 43, subsec. (4); chap. 110, Ill. Rev. Stat. 1937.) Defendants evidently recognized that the note had a maturity of five years, because in 1931, when the note was about to mature, they arranged for an extension. Furthermore, they recognized the validity of the note during the entire period from 1926, when it was executed, until the foreclosure proceedings were instituted, by making payments thereon on account of principal and interest, and never questioned its validity until the matter was heard before the master.

It is next urged that Smart & Golee, Inc., was the owner of the note, and not Currey, the plaintiff. The evidence clearly discloses, however, that Currey purchased the note and mortgage from Smart & Golee on December 8, 1926, and paid therefor by check which was introduced in evidence. Based upon the premise that Smart & Golee, Inc., was the owner of the note, it is argued that it was a mortgagee in possession, and as such was accountable to defendants for the efficient management of the property, and that because they allowed tenants to remain in possession without the payment of rent they should be held to account, and the foreclosure suit should be dismissed. It is true that for a considerable period of time the tenants were allowed to remain in the premises without paying rent. The property was occupied by colored tenants, and most of them were in arrears when Smart & Golee, Inc., undertook the management of the property. Norman F. Lightheart testified that the rental conditions among colored tenants in Evanston at the time were deplorable. Many of them were on relief, and a large percentage of the checks collected were relief checks and were paid in-

the Civil Practice act, affirmative defenses, such as fraud, illegality, or that the instrument or transaction is either void or voidable in point of law, which would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. (Par. 164, sec. 40, subsec. (3); par. 167, sec. 43, subsec. (4); chap. 110, Ill. Rev. Stat. 1937.) Defendants evidently recognized that the note had a maturity of five years, because in 1931, when the note was about to mature, they arranged for an extension. Further more, they recognized the validity of the note during the entire period from 1926, when it was executed, until the foreclosure proceedings were instituted, by making payments thereon on account of principal and interest, and never questioned its validity until the matter was heard before the master.

It is next urged that Smart & Colee, Inc., was the owner of the note, and not Gurney, the plaintiff. The evidence clearly discloses, however, that Gurney purchased the note and mortgage from Smart & Colee on December 2, 1926, and paid therefor by check which was introduced in evidence. Based upon the premise that Smart & Colee Inc., was the owner of the note, it is argued that it was a mortgagee in possession, and as such was accountable to defendants for the efficient management of the property, and that because they allowed tenants to remain in possession without the payment of rent they should be held to account, and the foreclosure suit should be dismissed. It is true that for a considerable period of time the tenants were allowed to remain in the premises without paying rent. The property was occupied by colored tenants, and most of them were in arrears when Smart & Colee Inc., undertook the management of the property. Norman E. Lightbourne testified that the rental conditions among colored tenants in Evanston at the time were deplorable. Many of them were on relief, and a large percentage of the checks collected were relief checks and were paid in

termittently, without any regular schedule; that the collector paid visits to the tenants "a couple of time per week, at intervals," and on several occasions resorted to suing for rent; that small payments would be made on account, and promises made for the future; that there was no demand for the premises by other tenants, and if the delinquent tenants had been dispossessed there would have been no likelihood of securing rentals from others who might have entered into possession. The contention that the mortgagee may be surcharged if he leases the premises to a tenant who is notoriously delinquent, or to allow such tenant to remain for an unreasonable time without paying rent, is not applicable, because Smart & Golee, Inc., was not a mortgagee in possession under the evidence in the case. Moreover, all of the tenants occupied their respective partments before Smart & Golee, Inc., took charge, and the record discloses that after Smart & Golee, Inc., relinquished the management of the property, in the fall of 1935, defendants managed the premises themselves, and collected the rents for approximately two years, and that one of the tenants, a Mrs. Summerville, who was most in arrears, was still occupying one of the apartments when the briefs were filed.

The master's report and the decree finding that Samuel G. Currey, plaintiff, was the owner and holder of the note, and that there were defaults in the payment of principal and interest, are amply sustained by the evidence, and therefore we are of the opinion that the court properly entered the foreclosure decree in question.

During the pendency of the appeal Currey moved to dismiss the same. That motion was reserved to the hearing, and will be denied. Another motion to dismiss the appeal was made by Christian J. Golee, trustee, who was made a defendant to defendants' counterclaim, and filed his answer. His motion is based on the failure of defendants to serve him with notice of appeal, as required by rule 34 of the

terminatively, without any regular schedule; that the collector paid visits to the tenants "a couple of time per week, at intervals," and on several occasions resorted to suing for rent; that small payments would be made on account, and promises made for the future; that there was no demand for the premises by other tenants, and if the delinquent tenants had been dispossessed there would have been no likelihood of accounting rentals from others who might have entered into possession. The contention that the mortgagee may be answerable if he leases the premises to a tenant who is notoriously delinquent, or to allow such tenant to remain for an unreasonable time without paying rent, is not applicable, because Smart & Colee, Inc., was not a mortgagee in possession under the evidence in the case. Moreover, all of the tenants occupied their respective premises before Smart & Colee, Inc., took charge, and the record discloses that after Smart & Colee, Inc., relinquished the management of the property, in the fall of 1933, defendants managed the premises themselves, and collected the rents for approximately two years, and that one of the tenants, a Mrs. Summerville, who was most in arrears, was still occupying one of the apartments when the briefs were filed.

The master's report and the decree finding that Samuel C. Surrey, plaintiff, was the owner and holder of the note, and that there were defaults in the payment of principal and interest, are amply sustained by the evidence, and therefore we are of the opinion that the court properly entered the foreclosure decree in question.

During the pendency of the appeal Surrey moved to dismiss the same. That motion was reserved to the hearing, and will be denied. Another motion to dismiss the appeal was made by Christian T. Colee, trustee, who was made a defendant to defendants' counterclaim, and filed his answer. His motion is based on the failure of defendants to serve him with notice of appeal, as required by Rule 34 of the

Supreme court. Defendants, evidently realizing the necessity of serving notice on this defendant, subsequently moved for leave to serve notice on Golee and others who had not been served. That motion was denied. In Louis v. Renfro, 291 Ill. App. 396, it was held that an appeal should be dismissed where notice thereof is not served upon necessary parties, and since Golee was made a defendant to the counterclaim, and filed his answer, he was entitled to such notice. Because of the failure of defendants to comply with the rule, the appeal will have to be dismissed as to the defendant, Christian F. Golee.

Defendants feel themselves aggrieved against Smart & Golee, Inc., and Christian F. Golee, the trustee, because of the substantial amounts of rentals which were permitted to accrue in the years that Smart & Golee, Inc., managed the property. Inasmuch as the appeal must be dismissed as to Golee for the reasons heretofore stated, it would be impossible to make any adjudication in this proceeding upon defendants' counterclaim, or to pass upon the merits of their contention. However, if they have any recourse against him, it may be asserted in an independent proceeding.

So far as the decree itself is concerned, we find no reversible error, and it is therefore affirmed.

APPEAL DISMISSED AS TO CHRISTIAN F. GOLEE
AND AFFIRMED AS TO OTHERS.

Scanlan and Sullivan, JJ., concur.

supreme court. Defendants, evidently realizing the necessity of serving notice on the defendant, subsequently moved for leave to serve notice on Coles and others who had not been served. That motion was denied. In Lynch v. Benito, 121 III. App. 326, it was held that an appeal should be dismissed where notice thereof is not served upon necessary parties, and since Coles was made a defendant to the counterclaim, and filed his answer, he was entitled to such notice. Because of the failure of defendants to comply with the rule the appeal will have to be dismissed as to the defendant, Christian T. Coles.

Defendants feel themselves aggrieved against Smart & Coles, Inc., and Christian T. Coles, the trustee, because of the substantial amounts of rentals which were permitted to accrue in the years that Smart & Coles, Inc., occupied the property. Inasmuch as the appeal must be dismissed as to Coles for the reasons heretofore stated, it would be improperly to make any disposition in this proceeding upon defendants' counterclaim, or to pass upon the merits of their contention. However, if they have any recourse against him, it may be asserted in an independent proceeding.

So far as the decree itself is concerned, we find no reversible error, and it is therefore affirmed.

ARTHUR DIERKING, § TO CHRISTIAN T. COLES AND ARTHUR D. TO OTHER.

Dossman and Sullivan, JJ., concur.

39787

THE APPLE-COLE COMPANY,
a corporation,
Appellee,

v.

HARRY C. MAIBOHM,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

295 I.A. 613

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

The Apple-Cole Company, plaintiff, brought suit against Harry C. Maibohm, defendant, to recover commissions for the sale of 43,575 shares of Simplex Radio Company stock owned by defendant, to one C. Russell Feldmann, whom plaintiff procured as a purchaser of the stock. Trial was had by the court without a jury, resulting in a finding and judgment for plaintiff in the sum of $9,175.75, from which this appeal is prosecuted.

The salient facts disclose that plaintiff is engaged in the business of finding purchasers for businesses and stocks of various kinds. Defendant owned or controlled some 43,575 shares of Simplex Radio Company stock, for which plaintiff undertook to find a purchaser. An oral agreement was made between the parties in August or September, 1936, wherein defendant agreed to pay plaintiff a commission on any amount in excess of $5 a share to defendant. Plaintiff solicited various clients, including W. S. Grant, Michael Tauber of Chicago, Radio Mfg. Company of Detroit, and others. None of these prospective deals were consummated. Finally plaintiff contacted C. Russell Feldmann of New York, who had been associated with Philco Radio Corporation. Various nego-

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THE APPLE-COLE COMPANY,
a corporation,
Appellee,

v.

HARRY O. MALCHOW,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

295 I.A. 613

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

The Apple-Cole Company, plaintiff, brought suit against Harry O. Malchow, defendant, to recover commissions for the sale of 45,575 shares of Simplex Radio Company stock owned by defendant, to one O. Russell Feldmann, whom plaintiff procured as a purchaser of the stock. Trial was had in the court without a jury, resulting in a finding and judgment for plaintiff in the sum of $9,172.75, from which this appeal is prosecuted.

The salient facts disclose that plaintiff is engaged in the business of finding purchasers for businesses and stocks of various kinds. Defendant owned or controlled some 45,575 shares of Simplex Radio Company stock, for which plaintiff undertook to find a purchaser. An oral agreement was made between the parties in August or September, 1926, whereby defendant agreed to pay plaintiff a commission on any amount in excess of $5 a share to defendant. Plaintiff solicited various clients, including E. A. Grant, Michael Tauber of Chicago, Radio M[illegible] Company of Detroit, and others. None of these prospective deals were consummated. Finally plaintiff contacted O. Russell Feldmann of New York, who had been associated with Radio Corporation. Various nego-

tiations were had between plaintiff and Feldmann, during which prices ranging as high as $7 a share were submitted, but Feldmann preferred to consummate the purchase himself, without the presence of a broker, and in pursuance of his wish Bruce Grannis, vice president of plaintiff, took Feldmann to Sandusky, Ohio, in November, 1936, and introduced him to defendant. As a result of this contact Feldmann agreed to purchase defendant's stock on January 28, 1937, at a net price of $5.24-1/2 a share, aggregating $238,550.87-1/2. It is conceded that plaintiff procured Feldmann as purchaser, that the stock was sold to him by defendant at the foregoing price, and that plaintiff, through its representatives made several trips to Sandusky and rendered substantial services in consummating the transaction.

The principal defense interposed and relied on is that when the sale was made January 28, 1937, a new and supplemental agreement was entered into between plaintiff and defendant, by which plaintiff agreed to accept $1,500 in full settlement of its commission, to be paid by Feldmann; that this sum was paid to plaintiff, and that defendant thereby became relived of any obligation to pay plaintiff the commission contemplated by the original agreement. It was, of course, incumbent upon defendant to sustain the burden of proving this defense. It appears from the evidence that before the deal was closed January 28, 1937, at Sandusky, Ohio, Maibohm called plaintiff over the telephone and talked to Grannis. He stated that he would have to take less for his stock than he expected, and would therefore not consummate the deal with Feldmann unless plaintiff agreed to accept $1,500 in full payment from Feldmann and defendant as its commission. Maibohm testified that in his conversation with Grannis he said: "Now, if you will accept this amount, I will go ahead with the deal," and that Grannis said to him, "We have not

tiations were had between plaintiff and Feldmann, during which prices ranging as high as $7 a share were submitted, but Feldmann preferred to consummate the purchase himself, without the presence of a broker, and in pursuance of his wish Bruce Dremmik, vice president of plaintiff, took Feldmann to Sandusky, Ohio, in November 1926, and introduced him to defendant. As a result of this contact Feldmann agreed to purchase defendant's stock on January 20, 1927, at a net price of $6.04-1/2 a share, aggregating $38,[illegible].27-1/2. It is conceded that plaintiff procured Feldmann as purchaser, that the stock was sold to him by defendant at the foregoing price, and that plaintiff, through its representatives made several trips to Sandusky and rendered substantial services in consummating the transaction.

The principal defense interposed and relied on is that when the sale was made January 20, 1927, a new and supplemental agreement was entered into between plaintiff and defendant, by which plaintiff agreed to accept $1,500 in full settlement of its commission, to be paid by Feldmann; that this sum was paid to plaintiff, and that defendant thereby became relieved of any obligation to pay plaintiff the commission contemplated by the original agreement. It was, of course, incumbent upon defendant to sustain the burden of proving this defense. It appears from the evidence that before the deal was closed January 20, 1927, at Sandusky, Ohio, Maibohm called plaintiff over the telephone and talked to Dremmik. He stated that he would have to make less for his stock than he expected, and would therefore not consummate the deal with Feldmann unless plaintiff agreed to accept $1,500 in full payment from Feldmann and defendant as its commission. Maibohm testified that in his conversation with Dremmik he said: "Now, if you will accept this amount, I will go ahead with the deal," and that Dremmik said to him, "We have not

done very much on the deal, *** Is that the best you can do?"; that Maibohm then said, "If you don't take $1,500 there will be no deal," and that Grannis replied, "Go ahead, if that's all you can give."

Feldmann was reluctant to sign the contract without a clear understanding as to the commissions, and after Maibohm had finished his conversation with Grannis Feldmann took the 'phone for the purpose of ascertaining what Grannis had said to Maibohm about the $1,500 settlement. He testified that Grannis told him that $1,500 was less than the expense plaintiff had been put to in connection with the deal, but "I don't want to upset any deal *** and I will take it up with my associates and I will send you a wire." Feldmann then inquired whether that wire would be sent the same afternoon, and Grannis replied it would be. The evidence discloses that later that same day the following telegram was sent and received: "Our files reveal your personal offer would not cover expenses on sale of Simplex stock. We never expected to make less than 10%, as per our agreement with Harry. Mr. Apple (plaintiff's president) not satisfied unless Harry pays fifteen hundred also, as three thousand is not even a finder's fee on deal of this kind. If time is an element in this transaction, we will confirm by letter upon receipt of your wire agreeing to pay three thousand at the time of signing purchase agreement." Defendant's contention that plaintiff agreed to accept $1,500 in full settlement of its commission is clearly rebutted by this telegram and by testimony as to the telephone conversation that preceded it. The telegram was at best a counter-proposal, and since neither Feldmann nor Maibohm ever replied to the offer of plaintiff to accept $3,000, that offer could not have resulted in a new and supplemental agreement, as defendant contends. It further appears from the evidence that when Maibohm telephoned Grannis he advised

done very much on the deal. *** Is that the best you can do?" that Baldwin then said, "If you don't take $1,500 there will be no deal," and that Dramia replied, "Go ahead, if that's all you can give."

Feldmann was reluctant to sign the contract without a clear understanding as to the commissions, and after Baldwin had finished his conversation with Dramia Feldmann took the 'phone for the purpose of ascertaining what Dramia had said to Baldwin about the $1,500 settlement. He testified that Dramia told him that $1,500 was less than the expense plaintiff had been put to in connection with the deal, but "I don't want to upset any deal *** and I will take it up with my associates and I will send you a wire." Feldmann then inquired whether that wire would be sent the same afternoon, and Dramia replied it would be. The evidence discloses that later that same day the following telegram was sent and received: "Our files reveal your personal offer would not cover expenses on sale of Simplicitook. We never expected to make less than 10%, as per our agreement with Harry. Mr. Apple (plaintiff's president) not satisfied unless Harry pays fifteen hundred also, as three thousand is not even a finder's fee on deal of this kind. If this is an element in this transaction, we will confirm by letter upon receipt of your wire agreeing to pay three thousand at the time of closing purchase agreement." Defendant's contention that plaintiff agreed to accept $1,500 in full settlement of its commission is clearly refuted by this telegram and by testimony as to the telephone conversation that preceded it. The telegram was at best a counter-proposal, and since neither Feldmann nor Baldwin ever replied to the offer of plaintiff to accept $3,000, that offer could not have resulted in a new and supplemental agreement, as defendant contends. It further appears from the evidence that when Baldwin telephoned Dramia he advised

him that he was receiving not to exceed $5 a share for the stock, and the conversation that ensued was predicated upon this statement. Feldmann's evidence and the facts clearly disclose that when the conversation was had Feldmann had agreed to purchase the stock from Maibohm at $5.25 a share, and therefore Maibohm cannot urge his own misstatement as a basis for a supplemental agreement on the part of plaintiff to accept a smaller commission than the original contract contemplated.

It further appears from the evidence that Maibohm had represented to Feldmann that there would be no undisclosed liabilities of the Simplex Radio Company. It developed, however, that there were $60,000 in undisclosed liabilities against the 43,575 shares of stock. This amounted to over $1 a share, and as a result thereof Maibohm will receive $60,000 less than set forth in the complaint. When these circumstances were disclosed at the trial Maibohm's counsel pointed out to the court that because of this item of undisclosed liability Maibohm would not receive $5 a share for his stock, and he thereupon sought to amend his complaint. The court refused to permit him so to do, and he urges that as error. It is reasonable to assume that if defendant had disclosed to plaintiff the $60,000 liabilities which he was concealing, plaintiff might well have hesitated entering into an agreement whereby its commission would be only on the excess above $5 a share. The withholding of this information, although it affected the net price which Maibohm is ultimately to receive for his stock, was a concealment for which plaintiff should not be made to suffer, and we think the court properly denied defendant's motion to amend his pleadings to conform with the proofs and thereby show that he had received less than $5 a share, net, for his stock.

In support of the judgment plaintiff argues that there is no consideration for the alleged new and supplemental agreement,

him that he was receiving not to exceed $3 a share for the stock, and the conversation that ensued was predicated upon that statement. Feldmann's evidence and the facts clearly disclose that when the conversation was had Feldmann had agreed to purchase the stock from Mahlon at $3.25 a share, and therefore Mahlon cannot urge his own misstatement as a basis for a supplemental agreement on the part of plaintiff to accept a smaller consideration than the original contract contemplated.

It further appears from the evidence that Mahlon had represented to Feldmann that there would be no undisclosed liabilities of the Simplex Mills Company. It developed, however, that there were $60,000 in undisclosed liabilities against the 43,875 shares of stock. This amounted to over $1 a share, and as a result thereof Mahlon will receive $60,000 less than set forth in the complaint. When these circumstances were disclosed at the trial Mahlon's counsel pointed out to the court that because of this item of undisclosed liability Mahlon would not receive $3 a share for his stock, and he thereupon sought to amend his complaint. The court refused to permit him so to do, and he urges that as error. It is reasonable to assume that if defendant had disclosed to plaintiff the $60,000 liabilities which he was concealing, plaintiff might well have hesitated entering into an agreement whereby its consideration would be only on the excess above $3 a share. The withholding of this information, although it affected the net price which Mahlon is ultimately to receive for his stock, was a concealment for which plaintiff should not be made to suffer, and we think the court properly denied defendant's motion to amend his pleadings to conform with the proofs and thereby show that he had received less than $3 a share, net, for his stock.

In support of the judgment plaintiff argues that there is no consideration for the alleged new and supplemental agreement,

even if such an agreement had been made, and counsel for both sides devote a considerable portion of their briefs to a discussion of the early cases of Bishop v. Busse, 69 Ill. 403, and Cooke v. Murphy, 70 Ill. 96. These cases deal with the question whether a promise to pay other or additional sums, where a prior agreement for a fixed amount exists, is supported by a good and sufficient consideration. We had occasion to consider this question at length in Marcus v. S. S. Kresge Co., 283 Ill. App. 556, and after reviewing the decisions, including Bishop v. Busse and Cooke v. Murphy, we concluded that the reviewing courts of this state have not followed the doctrine laid down in these cases and have in subsequent decisions either distinguished them from the facts in the later cases or held them to be in conflict with more recent decisions. Moreover, we entertain the view that the doctrine discussed in these cases has no application to the case at bar, because the defense that a supplemental agreement was made is not sustained by the evidence. Maibohm testified that there was such an agreement, but both Grannis and Feldmann denied it, and the documentary evidence and circumstances of the case clearly indicate that in the telephone conversation between Maibohm and Grannis, Grannis advised Maibohm that he would take the matter up with his associates and advise him further. The telegram heretofore referred to indicates that a counter-proposal was made to accept $3,000, which was never accepted by Maibohm or Feldmann, and therefore the supplemental agreement was never consummated.

This case presents a situation where pliintiff, in good faith, procured a purchaser for the sale of defendant's stock, at a net price of $5.24-1/2 a share, for which defendant received a very substantial sum of money. Defendant's counsel in his reply brief states, in the first paragraph, that "the defendant bases his reason for a reversal largely, but not exclusively, on point one of his original brief." The

even if such an agreement had been made, and assumed for both sides devote a considerable portion of their briefs to a discussion of the early cases of Rishon v. Burns, 60 Ill. 403, and Jacks v. Murphy, 70 Ill. 96. These cases deal with the question whether a promise to pay other or additional sums, where a prior agreement for a fixed amount exists, is supported by a real and sufficient consideration. We had occasion to consider this question at length in Kurzon v. J. J. Kresge Co., 283 Ill. App. 588, and after reviewing the decisions, including Bishop v. Burns and Cooke v. Murphy, we concluded that the reviewing courts of this state have not followed the doctrine laid down in these cases and have in subsequent decisions attempted distinguished them from the facts in the later cases or held them to be in conflict with more recent decisions. Moreover, we undertook the view that the doctrine discussed in these cases has no application to the case at bar, because the defense that a supplemental agreement was made is not sustained by the evidence. Mahlon testified that there was such an agreement, but both Dennis and Maldonn denied it, and the documentary evidence and circumstances of the case clearly indicate that in the telephone conversation between Maldonn and Dennis, Dennis advised Maldonn that he would take the matter up with his associates and advise him further. The telegram hereinbefore referred to indicates that a counter-proposal was made to accept $3,000, which was never accepted by Maldonn or Maldonn, and therefore the supplemental agreement was never consummated.

This case presents a situation where plaintiff, in good faith procured a purchaser for the sale of defendant's stock, at a net price of $5,254-1/2 a share, for which defendant received a very substantial sum of money. Defendant's counsel in his reply brief states, in the first paragraph, that "the defendant bases his reason for a reversal largely, but not exclusively, on point one of his original brief." The

point referred to is the supplemental agreement set forth in defendant's answer. The evidence does not sustain defendant's position, and we think the court was fully justified in so holding. We find no convincing reason for reversal, and therefore the judgment of the superior court is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

point referred to is the supplemental agreement set forth in defendants answer. The evidence does not contain sufficient conclusion and we think the court was fully justified in so holding. We find no controlling reason for reversal, and therefore the judgment of the superior court is affirmed.

AFFIRMED.

Gordon and Sullivan, JJ., concur.

39799

JOHN SHIMMER and VIOLET FELDMANN,
doing business as THOR PRESS,
Appellants,

v.

HENRY SPERO, doing business as
TYPE AND PRESS OF ILLINOIS; BAZNER
PRESS, Inc., a corporation,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

295 I.A. 613

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

John Shimmer and Violet Feldmann, doing business as Thor Press, filed suit in the municipal court for the replevin of a 20-ton printing press, a Rouse paper lift and an extension delivery, valued at about $1,500. The court found the right of property in defendants, and after overruling plaintiffs' motions for a new trial and in arrest of judgment, entered judgment that defendants have and retain possession of the property replevied, together with costs.

While the appeal was pending defendants moved to dismiss the appeal for the reason that the record was not filed in this court within the time provided by the rules. The judgment sought to be reviewed was entered May 21, 1937. Notice of appeal was filed in the municipal court June 8, 1937. Rule 36 (2) (a) of the Illinois Supreme Court (Illinois Revised Statutes, 1937, chap. 110, par. 259.36, provides that "when the praecipes do not specify any proceedings at trial, the record on appeal shall be transmitted to the reviewing court not more than 30 days after notice of appeal has been filed." Therefore, if the praecipe in this case had not specified any proceed-

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

HENRY DRAKO, doing business as TYPE AND PRESS OF ILLINOIS; BANNER PRESS, Inc., a corporation,
Appellees.

v.

JOHN SHIMMER and VIOLET TELEMANN, doing business as THOR PRESS,
Appellants.

MR. PRESIDING JUSTICE TAYLOR
DELIVERED THE OPINION OF THE COURT.

John Shimmer and Violet Telemann, doing business as Thor Press, filed suit in the municipal court for the replevin of a 20-ton printing press, a house paper lift and an extension delivery, valued at about $1,300. The court found the right of property in defendants, and after overruling plaintiffs' motions for a new trial and in arrest of judgment, entered judgment that defendants have and retain possession of the property replevied, together with costs.

While the appeal was pending defendants moved to dismiss the appeal for the reason that the record was not filed in this court within the time provided by the rules. The judgment sought to be reviewed was entered May 21, 1927. Notice of appeal was filed in the municipal court June 8, 1927. Rule 36 (2) (a) of the Illinois Supreme Court (Illinois Revised Statutes, 1927, chap. 110, par. 259.36) provides that "when the praecipe do not specify any proceedings at trial, the record on appeal shall be transmitted to the reviewing court not more than 30 days after notice of appeal has been filed." Therefore, if the praecipe in this case had not specified any proceed

ings at the trial, plaintiffs would have been required to file their record on appeal in this court not later than July 8, 1937. The record discloses that plaintiffs filed their praecipe for record in the trial court on June 15, 1937, directing the clerk to incorporate therein "report of proceedings at trial of said cause." The record on appeal was filed September 3, 1937, but does not contain any report of proceedings at trial nor any other document which might be construed as such.

A motion to dismiss the appeal under similar circumstances was made and allowed in West Side Trust & Savings Bank v. Damond, 280 Ill. App. 343 (petition for leave to appeal denied by Supreme court in 280 Ill. App. XVIII). In that case the order appealed from was entered June 1, 1934, notice of appeal was filed August 29, 1934, and on September 7, 1934, a praecipe for record was filed calling for a report of proceedings. The record on appeal was filed in this court on November 7, 1934, and no report of proceedings was included therein. The motion to dismiss the appeal was based "upon the ground that the record on appeal was not filed here within the time prescribed by the rules of this court," and in discussing the motion to dismiss we said (p. 349): "A record must be filed in this court within 35 days after the filing of the notice of appeal when the praecipe does not specify a report of the proceedings. Rule 1, sec. (2), par. (b) of this court was intended to apply to cases wherein an appellant requires a report of proceedings to properly present his appeal to this court, and an appellant cannot extend the 35-day period allowed by par. (a) and the amendment to Rule 10 by specifying in his praecipe a 'Report of Proceedings,' where the record shows that no such report is necessary or proper. To hold otherwise would, in actual practice, render the time limit fixed by Rule 1, sec. (2), par. (a), for the filing of the record

ings at the trial, plaintiffs could have been required to file their record on appeal in this court not later than July 8, 1937. The record discloses that plaintiffs filed their praecipe for record in the trial court on June 15, 1937, directing the clerk to incorporate therein "report of proceedings at trial of said cause." The record on appeal was filed September 3, 1937, but does not contain any report of proceedings at trial nor any other document which might be construed as such.

A motion to dismiss the appeal under similar circumstances was made and allowed in West Side Trust & Savings Bank v. Lomond, 280 Ill. App. 343 (petition for leave to appeal denied by supreme court in 280 Ill. Adv. XVIII). In that case the order appealed from was entered June 1, 1934, notice of appeal was filed August 29, 1934, and on September 7, 1934, a praecipe for record was filed calling for a report of proceedings. The record on appeal was filed in this court on November 7, 1934, and no report of proceedings was included therein. The motion to dismiss the appeal was based "upon the ground that the record on appeal was not filed here within the time prescribed by the rules of this court," and in discussing the motion to dismiss we said (p. 346): "A record must be filed in this court within 35 days after the filing of the notice of appeal when the praecipe does not specify a report of the proceedings. Rule 1, sec. (2), par. (b) of this court was intended to apply to cases wherein an appellant requires a report of proceedings to properly present his appeal to this court, and an appellant cannot extend the 35-day period allowed by par. (a) and the amendment to Rule 10 by specifying in his praecipe a 'Report of Proceedings,' where the record shows that no such report is necessary or proper. To hold otherwise would, in actual practice, render the time limit fixed by Rule 1, sec. (2), par. (a), for the filing of the record

on review practically nugatory. The provision in Rule 1, sec. (1), par. (e), permitting the filing of the record in this court 'in proper time without such proceedings' where an election has been made, means, in our judgment, that appellants are bound to file their record in this court within 35 days after the filing of the notice of appeal. Par. (e) gives an appellant a right 'not to include any proceedings at the trial' in the record, but if he exercises that right he is then placed in the same position in which he would have been had his praecipe not designated a report of proceedings. Or, to state it in another way, the only right given an appellant by that rule is to elect not to include the report of proceedings where the praecipe had notified the clerk to include it." Plaintiffs seek to differentiate that case on various grounds. They argue that the order appealed from was based solely upon the pleadings, whereas in the case at bar, for which a review is sought, there is a final judgment based upon the evidence and findings of the court and therefore a report of proceedings is necessary. It is also contended that a correct transcript of the proceedings was presented to the trial judge, and marked "presented" on August 6, 1937, but that because defendants refused to agree to the correctness thereof, the judge refused to certify it and thereafter left on his vacation and did not return until the convening of court in fall. However, these circumstances do not aid plaintiffs, because under the rules they are in no better position than if they had never presented a report of proceedings. The rules clearly specify the time within which the record is required to be filed in this court, and plaintiffs cannot secure an extension of the 30-day period allowed under the rule by specifying in their praecipe a report of proceedings where the record shows that no such report was filed. As was said in West Side Trust & Savings Bank v. Damond, supra, "to hold otherwise would, in actual practice, render the time limit fixed by Rule 1, sec. (2), par. (a),

on review practically mandatory. The provision in Rule 1, sec. (1), par. (e), permitting the filing of the record in this court 'in proper time without such proceedings' where an election has been made, means, in our judgment, that appellants are bound to file their record in this court within 30 days after the filing of the notice of appeal. Par. (e) gives an appellant a right 'not to include any proceedings at the trial' in the record, but if he exercises that right he is then placed in the same position in which he would have been had his praecipe not designated a report of proceedings. Or, to state it in another way, the only right given an appellant by that rule is to elect not to include the report of proceedings where the praecipe had notified the clerk to include it." Plaintiffs seek to differentiate that case on various grounds. They argue that the order appealed from was based solely upon the pleadings, whereas in the case at bar, for which a review is sought, there is a final judgment based upon the evidence and findings of the court and therefore a report of proceedings is necessary. It is also contended that a correct transcript of the proceedings was presented to the trial judge, and marked "presented" on August 6, 1937, but that because defendants refused to agree to the correctness thereof, the judge refused to certify it and thereafter left on his vacation and did not return until the convening of court in fall. However, these circumstances do not aid plaintiffs, because under the rules they are in no better position than if they had never presented a report of proceedings. The rules clearly specify the time within which the record is required to be filed in this court, and plaintiffs cannot secure an extension of the 30-day period allowed under the rule by specifying in their praecipe a report of proceedings where the record shows that no such report was filed. As was said in West Side Trust & Savings Bank v. Thomas, supra, "to hold otherwise would, in actual practice, render the time limit fixed by Rule 1, sec. (2), par. (a),

for the filing of the record on review, practically nugatory." Since the record on appeal in this case includes no report of proceedings at trial, and the record having been filed in this court more than thirty days after the filing of the notice of appeal in the trial court, the appeal should be dismissed and it is so ordered.

APPEAL DISMISSED.

Scanlan and Sullivan, JJ., concur.

for the filing of the record on review, respectfully suggests."

Since the record on appeal in this case includes no report of proceedings at trial, and the record having been filed in this court more than thirty days after the filing of the notice of appeal in the trial court, the appeal should be dismissed and it is so ordered.

APPEAL DISMISSED.

Coughlan and Sullivan, JJ., concur.

39836

CHARLES H. AIBERS, receiver of Peoples State Bank of Arlington Heights, a corporation,
Plaintiff and Appellee,

v.

HERMAN F. REDEKER et al.,
Defendants.

MINA REDEKER,
Appellant.

/2 A

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

295 I.A. 614

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The Peoples State Bank of Arlington Heights filed its amended complaint in the Superior court October 17, 1927, against Herman F. Redeker, John H. Redeker, Eleanore Redeker and Mina Redeker, heirs and devisees of Friedrich Redeker, deceased, who was the father of the first three named defendants and the husband of MinaRedeker, the other defendant, seeking an accounting for sums alleged to have been wrongfully and fraudulently converted by Friedrich Redeker and his son, Herman, officers of the bank. Answers were filed by the various defendants denying plaintiff's right to an accounting. The cause was thereafter referred to a master on the question of the right to an accounting, and after numerous hearings the master filed his report recommending an accounting. The chancellor overruled defendants' exceptions to the master's report, adopted the master's recommendations, and March 6, 1930, entered a decree finding that plaintiff was entitled to an accounting and rereferred the cause to the master to take and state the account. The defendants prosecuted an appeal from the decree thus entered, which was affirmed by this

29829

CHARLES K. ADAMS, receiver of
People State Bank of Arlington
Heights, a corporation,
Plaintiff and Appellee,

v.

HERMAN F. REDEKER et al.,
Defendants.

MINA REDEKER,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

295 I.A. 614

MR. PRESIDING JUSTICE WILLARD
DELIVERED THE OPINION OF THE COURT.

The People State Bank of Arlington Heights filed its amended complaint in the Superior Court October 17, 1927, against Herman F. Redeker, John H. Redeker, Eleanore Redeker and Mina Redeker, heirs and devisees of Frederick Redeker, deceased, who was the father of the first three named defendants and the husband of Minaredeker, the other defendant, seeking an accounting for sums alleged to have been wrongfully and fraudulently converted by Frederick Redeker and his son, Herman, officers of the bank. Answers were filed by the various defendants denying plaintiff's right to an accounting. The cause was thereafter referred to a master on the question of the right to an accounting, and after numerous hearings the master filed his report recommending an accounting. The chancellor overruled defendants' exceptions to the master's report, adopted the master's recommendations, and March 6, 1930, entered a decree finding that plaintiff was entitled to an accounting and referred the cause to the master to take and state the account. The defendants prosecute an appeal from the decree thus entered, which was affirmed by this

branch of the appellate court in case number ~~54368~~ 34386, published in abstract form in 261 Ill. App. 639. After rereference of the cause to the master plaintiff filed its amended and supplemental complaint, alleging that on December 29, 1930, the defendant, John H. Redeker, had died intestate and unmarried, leaving Herman F. Redeker, his brother, Eleanore Redeker, his sister, and Mina Redeker, his mother, his only heirs at law; that in 1925 and 1926 the defendants, as legatees and devisees of Friedrich Redeker, had received from his estate the personal property remaining after payment of costs and claims, amounting in value to about $25,000; that in December, 1929, they had sold a parcel of real estate belonging to the estate, and that subsequent to the closing of the estate and prior to the filing of this proceeding they had sold and conveyed the remaining real estate for a sum in excess of $28,000; that in accordance with the terms and provisions of the will of Friedrich Redeker the defendants had received all the real and personal property belonging to the estate, which remained after the payment of the costs of administration and claims. The defendants, Mina and Eleanore Redeker, filed an answer to the amended and supplemental complaint denying that they had received any of said estate and also denying that plaintiff was entitled to any relief as against them. Subsequently, in December, 1933, William L. O'Connell, who had been appointed receiver of the plaintiff bank, was substituted as plaintiff, and upon O'Connell's death Charles H. Albers, the present receiver, carried on the litigation.

After the cause had been re-referred to the master further testimony was adduced on the accounting, and on June 25, 1936, the master filed his report disallowing certain items and finding that there was due plaintiff certain groups of items of discounts on transactions handled by Friedrich and Herman F. Redeker while

tremen of the appellate court in case number 3-[illegible], published in abstract form in 201 Ill. App. 659. After remittance of the cause to the master plaintiff filed its amended and supplemental complaint alleging that on December 29, 1920, the defendant, John H. Redoker, had died intestate and unmarried, leaving Herman E. Redoker, his brother, Lemore Redoker, his sister, and Alma Redoker, his mother, his only heirs at law; that in 1928 and 1929 the defendants, as legatees and devisees of Friedrich Redoker, had received from his estate the personal property remaining after payment of costs and claims, amounting in value to about $28,000; that in December, 1929, they had sold a parcel of real estate belonging to the estate, and that subsequent to the closing of the estate and prior to the filing of this proceeding they had sold and conveyed the remaining real estate for a sum in excess of $28,000; that in accordance with the terms and provisions of the will of Friedrich Redoker the defendants had received all the real and personal property belonging to the estate, which remained after the payment of the costs of administration and claims. The defendants, Alma and Lemore Redoker, filed an answer to the amended and supplemental complaint denying that they had received any of said estate and also denying that plaintiff was entitled to any relief as against them. Subsequently, in December, 1933, William L. O'Donnell, who had been appointed receiver of the plaintiff bank, was substituted as plaintiff, and upon O'Donnell's death Charles H. Albers, the present receiver, carried on the litigation.

After the cause had been re-referred to the master further testimony was adduced on the accounting, and on June 22, 1934, the master filed his report disallowing certain items and finding that there was due plaintiff certain groups of items of discounts on transactions handled by Friedrich and Herman E. Redoker while

they were officers and employees of the bank, covering the period from September 3, 1918, to January 31, 1922, totaling $45,229.83, and finding that said amount was due plaintiff from the defendants, Herman F. and Mina Redeker, jointly and severally; that Mina Redeker was not a party to the conspiracy found by the former decree to exist between Friedrich Redeker and Herman F. Redeker, but that she was liable as a deivsee of her deceased husband; that the personal property which she had received from the estate was valued at $22,725.95, and the value of the three parcels of real estate belonging to the estate, which had been sold, was $24,960. The master also found that neither the defendant, Eleanore, nor John H. Redeker were liable to plaintiff, because neither of them had misappropriated any funds belonging to the bank nor received any part of the estate of Friedrich Redeker. Exceptions to the master's report by Herman F. Redeker and Mina Redeker were overruled by the chancellor, and on June 1, 1937, a second decree was entered in accordance with the findings of the master, holding Herman F. Redeker and Mina Redeker jointly and severally liable in the principal sum of $27,011.05, together with interest and costs, making a total of $56,526.59. Mina Redeker has prosecuted this appeal from the decree thus entered and also from an order of June 4, 1937, entered nunc pro tunc, as of June 1, 1937, denying her petition for a rereference and a further hearing to establish the competency or incompetency of one of plaintiff's witnesses.

The complaint as amended charged that Friedrich and Herman F. Redeker had entered into a conspiracy to defraud the bank of large sums of money and of wrongfully taking and misappropriating and applying these sums to their own use; that pursuant to a conspiracy entered into between them they had at intervals between 1918 and 1924, as officers of the bank, bought for and on behalf of the bank

they were officers and employees of the bank, covering the period from September 3, 1918, to January 31, 1922, totalling $48,429.24, and finding that said amount was due plaintiff from the defendants, Herman F. and Mina Redeker, jointly and severally; that Mina Redeker was not a party to the conspiracy found by the former decree to exist between Friedrich Redeker and Herman F. Redeker, but that she was liable as a devisee of her deceased husband; that the personal property which she had received from the estate was valued at $22,723.22, and the value of the three parcels of real estate belonging to the estate, which had been sold, was $24,900. The master also found that neither the defendant, Elsmore, nor John H. Redeker were liable to plaintiff, because neither of them had misappropriated any funds belonging to the bank nor received any part of the estate of Friedrich Redeker. Exceptions to the master's report by Herman F. Redeker and Mina Redeker were overruled by the chancellor, and on June 1, 1927, a second decree was entered in accordance with the findings of the master, holding Herman F. Redeker and Mina Redeker jointly and severally liable in the principal sum of $27,011.05, together with interest and costs, making a total of $36,320.50. Mina Redeker has prosecuted this appeal from the decree thus entered and also from an order of June 4, 1927, entered nunc pro tunc, as of June 1, 1927, denying her petition for a reference and a further hearing to establish the incompetency or incompetency of one of plaintiff's witnesses.

The complaint as amended charged that Friedrich and Herman F. Redeker had entered into a conspiracy to defraud the bank of large sums of money and of wrongfully taking and misappropriating and applying these sums to their own use; that pursuant to a conspiracy entered into between them they had at intervals between 1918 and 1924, as officers of the bank, bought for and on behalf of the bank

from divers brokers large numbers of bonds and other securities at discounts, and paid the brokers with plaintiff's funds prices less than the par value of the securities, and wrongfully misappropriated and converted to their own use the funds and moneys of the bank amounting to the difference between the par value of the securities and the prices paid therefor, thus depriving the bank of large profits, service charges and other sums of money. In our former opinion we held that the accounting which was prayed for and decreed had for its basis the conspiracy and misdemeanor committed by the two Redekers, and that the evidence as disclosed by the record showed beyond all reasonable doubt a liability to account on the part of the defendants herein.

As ground for reversal of the decree now appealed from, defendant Mina Redeker seeks to have us again pass upon some of the questions which were adjudicated in the former appeal. The law is well settled that she is bound by the questions heretofore raised and adjudicated in case No. 34386. Rhodes v. Ashurst, 176 Ill. 351, is precisely in point. In that case a decree was entered finding the facts which entitled plaintiff to an accounting and directing the basis of the account. The whole matter was then referred to a master in chancery to take evidence, state the account and report to the court. A decree was entered in that case and the court held that (p. 353): "Whatever might have been its effect as res judicata had it not been appealed from, the plaintiffs in error certainly are now concluded by it. Having appealed from it and having procured the decision of this court upon the questions involved, they cannot now be heard to say that it was merely interlocutory."

It is urged by defendant that inasmuch as she was defending as an heir, legatee and devisee of Friedrich Redeker, deceased, the

from divers brokers large numbers of bonds and other securities at discounts, and paid the brokers with plaintiff's funds prices less than the par value of the securities, and wrongfully misappropriated and converted to their own use the funds and moneys of the bank amounting to the difference between the par value of the securities and the prices paid therefor, thus depriving the bank of large profits, service charges and other sums of money. In our former opinion we held that the accounting which was prayed for and decreed had for its basis the conspiracy and misdemeanor committed by the two Hodekers, and that the evidence as disclosed by the record showed beyond all reasonable doubt a liability to account on the part of the defendants herein.

As ground for reversal of the decree now appealed from, defendant Hima Hodeker seems to have us again pass upon some of the questions which were adjudicated in the former appeal. The law is well settled that she is bound by the questions heretofore raised and adjudicated in case No. 34369, Hodeker v. Hammerle, 176 Ill. 391, is precisely in point. In that case a decree was entered finding the facts which entitled plaintiff to an accounting and directing the basis of the account. The whole matter was then referred to a master in chancery to take evidence, state the account and report to the court. A decree was entered in that case and the court held that (p. 395): "Whatever might have been the effect as res judicata had it not been appealed from, the plaintiffs in error certainly are now concluded by it. Having appealed from it and having procured the decision of this court upon the questions involved, they cannot now be heard to say that it was merely interlocutory."

It is urged by defendant that inasmuch as she was defending as an heir, legatee and devisee of Friedrich Hodeker, deceased, the

proof offered by plaintiff of matters occurring prior to his death were not admissible as against her. Section 2 of the statute on evidence and depositions, chap. 59, Ill. Rev. Stats., is relied on to support this contention. We find, however, that under the authorities in this state, parties who conspire together to obtain money and property from another and misappropriate it are liable jointly and severally to the extent of the full amount of money or property misappropriated, and that it does not matter who received the funds. (Dixmoor Golf Club v. Evans, 325 Ill. 612; People v. Small, 319 Ill. 437; Farwell v. G. W. T. Company, 161 Ill. 522.) We held in our former opinion that Herman F. and Friedrich Redeker were both guilty of a conspiracy to defraud plaintiff, and therefore both of them were liable jointly and severally to the extent of the full amount of money or property misappropriated. If, therefore, Mina Redeker, the defendant, received the assets, both real and personal, of the estate of her deceased husband, which according to the evidence adduced before the master, amounted to more than the amount of the misappropriations, she would be liable equally with the defendant Herman F. Redeker. There is ample proof in the record that Mina Redeker received some of the assets from the estate and the proceeds from the sale of real estate belonging to the estate; the defendant Herman F. Redeker so testified.

It is further urged as ground for reversal that the rights of creditors of an ancestor to hold the heirs or devisees liable for the debts of the ancestor are governed by secs. 11 to 14 of the Statute of Frauds, and that the remedy is at law and not in equity. It has been held, however, that the remedies afforded by secs. 11 to 14 of the Statutes of Fraud are not the only remedies given creditors of an ancestor, but are merely cumulative. In Union Trust Co. v. Shoemaker, 258 Ill. 564, the court said that the remedies

proof offered by plaintiff of matters occurring prior to his death were not admissible as against her. Section 2 of the statute on evidence and depositions, chap. 32, Ill. Rev. Stats., is relied on to support this contention. We find, however, that under the authorities in this state, parties who conspire together to obtain money or property from another and misappropriate it are liable jointly and severally to the extent of the full amount of money or property misappropriated, and that it does not matter who received the funds. (Harmoor Golf Club v. Evans, 325 Ill. 612; People v. Hall, 319 Ill. 437; Farwell v. C. & T. Company, 161 Ill. 322.) We hold in our former opinion that Herman F. and Frederick Hedeker were both guilty of a conspiracy to defraud plaintiff, and therefore both of them were liable jointly and severally to the extent of the full amount of money or property misappropriated. It, therefore, Mina Hedeker, the defendant, received the assets, both real and personal, of the estate of her deceased husband, which according to the evidence adduced before the master, amounted to more than the amount of the misappropriations, she would be liable equally with the defendant Herman F. Hedeker. There is ample proof in the record that Mina Hedeker received some of the assets from the estate and the proceeds from the sale of real estate belonging to the estate; that defendant Herman F. Hedeker so testified.

It is further urged as ground for reversal that the rights of creditors of an ancestor to hold the heirs or devisees liable for the debts of the ancestor are governed by sec. 11 to 14 of the statute of Wills, and that the remedy is at law and not in equity. It has been held, however, that the remedies afforded by sec. 11 to 14 of the Statutes of Wills are not the only remedies given creditors of an ancestor, but are merely cumulative. In Union Trust Co. v. Shoemaker, 288 Ill. 564, the court said that the remedies

given by the statute "were intended to enlarge, and not to take away or limit, the remedies theretofore existing. Former remedies were not superseded but additional and cumlative remedies are created." Under the law of this state a creditor of a deceased debtor is permitted to pursue his remedies against the heirs and devisees of the debtor in equity. (Van Meter's Heirs v. Love's Heirs, 33 Ill. 260.) Moreover, this is one of the questions that was determined by the former decree, and is no longer open to review.

The two remaining points argued in defendant's brief are that (1) secs. 11 to 14 of the Statutes of Frauds are to be strictly construed, and only real estate or its value can be reached under the provisions of these sections; and (2) that it is only in cases where a claim is contingent during the period of administration of an estate, and therefore could not be presented against the estate, that equity will grant relief against heirs and legatees for personal property received from the ancestor. Both of these contentions were made and disposed of in our former opinion. It was urged on the former appeal that inasmuch as all of the property of Friedrich Redeker was inventoried in the probate court and his estate closed in December, 1926, and since the plaintiff did not within the required time file any claim against the estate, the bank's remedy under the provisions of sec. 70 of the administration act was limited to newly discovered assets of Friedrich Redeker's estate, and that the record did not disclose that there were any such newly discovered assets. In answer to this contention we held that sec. 70 had no application to this proceeding, because this was not an action against the estate of Friedrich Redeker but rather tgainst Herman F. Redeker, individually and as executor of Friedrich Redeker's will and other heirs, devisees and legatees. We also held that the cause of action was not barred by the statute of limitations or by reason of the fact that no claim had

given by the statute "were intended to enlarge, and not to take away or limit, the remedies theretofore existing. Former remedies were not superseded but additional and cumulative remedies are created." Under the law of this state a creditor of a deceased debtor is permitted to pursue his remedies against the heirs and devisees of the debtor in equity. (Van Meter's Heirs v. Love's Heirs, 33 Ill. 280.) Moreover, this is one of the questions that was determined by the former decree, and is no longer open to review.

The two remaining points urged in defendant's brief are that (1) sec. 11 to 14 of the Statutes of Frauds are to be strictly construed, and only real estate or its value can be reached under the provisions of these sections; and (2) that it is only in cases where a claim is contingent during the period of administration of an estate, and therefore could not be presented against the estate, that equity will grant relief against heirs and legatees for personal property received from the ancestor. Both of these contentions were made and disposed of in our former opinion. It was urged on the former appeal that inasmuch as all of the property of Frederick Redeker was inventoried in the probate court and his estate closed in December, 1926, and since the plaintiff did not within the required time file any claim against the estate, the bank's remedy under the provisions of sec. 70 of the administration act was limited to newly discovered assets of Frederick Redeker's estate, and that the record did not disclose that there were any such newly discovered assets. In answer to this contention we held that sec. 70 had no application to this proceeding, because this was not an action against the estate of Frederick Redeker but rather against Herman F. Redeker, individually and as executor of Frederick Redeker's will and other heirs, devisees and legatees. We also held that the cause of action was not barred by the statute of limitations or by reason of the fact that no claim had

been filed against the estate within one year from the time of granting letters testamentary, and that plaintiff was entitled in equity to proceed against the defendants. Defendant is bound by all of these findings in the former decree, and the affirmance thereof by this court on appeal.

From the master's findings upon the rereference it appears that the value of the personal property alone received by Mina Redeker from her deceased husband's estate was $22,775.95. Her receipt in evidence supports this finding. Defendant now claims that these securities were not valued at the foregoing sum; nevertheless she received them as of the foregoing value, and if they were of any other value it was incumbent upon her to introduce countervailing evidence. This she failed to do and upon the evidence adduced before the master, both on the original and rereference, the finding as stated in the receipt was sufficient to establish the value of the securities.

Defendant assigned as error the refusal of the court to rerefer the cause for the purpose of determining the competency of testimony given by Elmer F. Laurin. This point is not argued in defendant's brief, and under our rules (Rule 7) points not argued are considered waived.

We find no convincing reasons for reversing the decree of the Superior court and it is therefore affirmed.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

been filed against the estate within one year from the time of granting letters testamentary, and that plaintiff was entitled in equity to proceed against the defendants. Defendant is bound by all of these findings in the former decree, and the affirmance thereof by this court on appeal.

From the master's findings upon the references it appears that the value of the personal property alone received by Mina Federer from her deceased husband's estate was $22,775.93. Her receipt in evidence supports this finding. Defendant now claims that these securities were not valued at the foregoing amount notwithstanding she received them as of the foregoing value, and if they were of any other value it was incumbent upon her to introduce counterveiling evidence. This she failed to do and upon the evidence adduced before the master, both on the original and references, the finding as stated in the receipt was sufficient to establish the value of the securities.

Defendant assigns as error the refusal of the court to refer the cause for the purpose of determining the competency of testimony given by Mina L. Lawrin. This point is not argued in defendant's brief, and under our rules (Rule 7) points not argued are considered waived.

We find no convincing reasons for reversing the decree of the superior court and it is therefore affirmed.

DOUGLAS, J., concurs.

Bozman and Sullivan, JJ., concur.

39880

AUGUST FENDRICH and
REINHOLD FENDRICH,
Appellants,

v.

CHARLES KOZIOL and
CHARLES KOZIOL, Jr.,
Appellees.

13A

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

295 I.A. 614

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

August Fendrick and Reinhold Fendrick, plaintiffs, filed suit in the municipal court against Charles Koziol and Charles Koziol, Jr., for damages arising out of an automobile collision. When the case was reached for trial neither of the defendants nor their attorney appeared and a trial was had by jury ex parte. A special interrogatory was submitted to the jury as to whether defendants were guilty of wilful and wanton misconduct, and the jury answered in the affirmative. Judgment was therefore entered in favor of August Fendrich for $750 and in favor of Reinhold Fendrick for $250, against both defendants. August 20, 1937, each of the defendants filed a petition to vacate the judgments, and plaintiffs filed a motion to strike the petition for insufficiency in law. Plaintiffs' motion was overruled and the motions of defendants were sustained. Plaintiffs's appeal followed.

It appears from the record that the judgments by default were entered against both defendants April 28, 1937. Defendants were served with execution July 2, 1937, and on August 20, 1937, they filed their respective petitions to vacate and set aside the verdicts and judgments, alleging in substance that the suit against

32880

AUGUST BERGERON and
RAYMOND BERGERON,
Appellants,

v.

CHARLES MORION and
CHARLES MORION, Jr.,
Appellees.

ALLEN T. ON MUNICIPAL
COURT OF APPEALS.

MR. JUSTICE JUDGE DELIVERED THE OPINION OF THE COURT.

August Bergeron and Raymond Bergeron, plaintiffs, filed suit in the municipal court against Charles Morion and Charles Morion, Jr., for damages arising out of an automobile collision. When the case was reached for trial neither of the defendants nor their attorney appeared and a trial was had by jury ex parte. A special interrogatory was submitted to the jury as to whether defendants were guilty of willful and wanton misconduct, and the jury answered in the affirmative. Judgment was therefore entered in favor of August Bergeron for $750 and in favor of Raymond Bergeron for $250, against both defendants. August 20, 1937, each of the defendants filed a petition to vacate the judgments, and plaintiffs filed a motion to strike the petition for insufficiency in law. Plaintiffs' motion was overruled and the motions of defendants were sustained. Plaintiffs' appeal followed.

It appears from the record that the judgments by default were entered against both defendants April 28, 1937. Defendants were served with execution July 2, 1937, and on August 20, 1937, they filed their respective petitions to vacate and set aside the verdicts and judgments, alleging in substance that the suit against

them was filed April 30, 1936; that upon being served with summons both defendants, father and son, immediately employed an attorney to represent them, and that their appearances were filed in the municipal court May 9, 1936, together with an affidavit of defense; that the attorney was paid $5 on account, and defendants agreed to pay him $50 on the day of the trial and such additional sums as the attorney might require. It is alleged that defendants were advised by their attorney that it would be some time before the case could be reached for trial, and that petitioners would be required to do nothing until further advised; that they rested in the belief that they would be properly represented and relied upon the statements of their counsel. It is further alleged that when they were served with execution in the early part of July, 1937, which was the first knowledge they had of the trial or judgments, and more than thirty days after the judgments had been rendered, they immediately went to the office of their attorney and were informed by the janitor of the building that the office was closed and the attorney was in trouble and "very likely in jail"; that upon inquiry in the vicinity of the building, other people, including relatives of the attorney, informed them that he was under arrest; that they tried thereafter for several days to communicate with their attorney without success; that in the meantime there was a hearing July 14, 1937, on the body execution issued against Charles Koziol, Jr., the son, who consulted with his present attorney and appeared with him at the hearing on the body execution, which was postponed to August 13, 1937; that another continuance was procured, and his attorney thereupon prepared and filed the petition to vacate the judgments. It is also alleged that defendant Charles Koziol, Jr., has a just and meritorious defense, in that he was driving at an ordinary rate of speed, not prohibited by law, and

them was filed April 3, 1926; that upon being served with summons both defendants, father and son, immediately employed an attorney to represent them, and that their appearances were filed in the municipal court May 9, 1926, together with an affidavit of defense; that the attorney was paid $5 on account, and defendants agreed to pay him $50 on the day of the trial and such additional sums as the attorney might require. It is alleged that defendants were advised by their attorney that it would be some time before the case could be reached for trial, and that petitioners would be required to do nothing until further advised; that they rested in the belief that they would be properly represented and relied upon the statements of their counsel. It is further alleged that when they were served with execution in the early part of July, 1927, which was the first knowledge they had of the trial or judgments, and more than thirty days after the judgments had been rendered, they immediately went to the office of their attorney and were informed by the janitor of the building that the office was closed and the attorney was in trouble and "very likely in jail"; that upon inquiry in the vicinity of the building, other people, including relatives of the attorney, informed them that he was under arrest; that they tried thereafter for several days to communicate with their attorney without success; that in the meantime there was a hearing July 14, 1927, on the body execution issued against Charles Koziol, Jr., the son, who consulted with his present attorney and appeared with him at the hearing on the body execution, which was postponed to August 12, 1927; that another continuance was procured, and his attorney thereupon prepared and filed the petition to vacate the judgments. It is also alleged that defendant Charles Koziol, Jr., has a just and meritorious defense, in that he was driving at an ordinary rate of speed, not prohibited by law, and

was in the exercise of due care and caution at the time of the accident. As to Charles Koziol, Sr., it is alleged that he did not own the automobile then being driven by his son; that it was not kept on or about his premises; that he never rode in or saw said automobile; that neither the state license nor the city vehicle tax was in his name, and that he was not riding therein nor present in the vicinity when the accident occurred; that his son, Charles, was never employed by him, nor was he the servant or agent of his father, and that Charles Koziol, Jr., was not on a family errand or family business at the time of the accident.

The principal ground urged for reversal is that the court had no jurisdiction, in the absence of a motion made within thirty days after the entry of the judgment, to vacate or set the same aside on petitions filed thereafter. Plaintiffs rely on sec. 21 of the Municipal court act (Illinois Revised Statutes 1937, chap. 37, par. 376), which provides that "if no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; ***."

Obviously defendants could not have filed their petitions within thirty days after the entry of the judgments, because the execution which was the first notice they had did not issue until the lapse of thirty days, and was not served on defendants until some time thereafter. Our courts have had occasion to deal with similar situations from time to time and have laid down the rule that "the negligence of the attorney is the negligence of the party

was in the exercise of due care and caution at the time of the accident. As to Charles Koziol, Jr., it is alleged that he did not own the automobile then being driven by his son; that it was not kept on or about his premises; that he never rode in or saw said automobile; that neither the utility license nor the city vehicle tax was in his name, and that he was not within, thereabout nor present in the vicinity when the accident occurred; that his son, Charles, was never employed by him, nor was he the servant or agent of his father, and that Charles Koziol, Jr., was not on a family errand or family business at the time of the accident.

The principal ground urged for reversal is that the court had no jurisdiction, in the absence of a motion made within thirty days after the entry of the judgment, to vacate or set the same aside on petition filed thereafter. Plaintiffs rely on sec. 21 of the Municipal court act (Illinois Revised Statutes 1937, chap. 37, par. 376), which provides that "if no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree the same shall not be vacated, set aside or modified except upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; ***."

Obviously defendants could not have filed their petitions within thirty days after the entry of the judgments, because the execution which was the first notice they had did not issue until the lapse of thirty days, and was not served on defendants until some time thereafter. Our courts have had occasion to deal with similar situations from time to time and have laid down the rule that "the negligence of the attorney is the negligence of the party

himself, and *** in the absence of special circumstances making it equitable for the client to have relief," have adhered to that rule. (Italics ours.) (Kern v. Strausberger, 71 Ill. 413-415.) It is conceded that flimsy excuses will not relieve a litigant of his own neglect nor that of his attorney. However, we regard the circumstances of this case such as would make it inequitable to allow this judgment to stand and there is authority for relieving a litigant against situations of this character. The question to be considered on appeal is whether there was an abuse of discretion by the trial court in setting aside the judgment. (Pitzele v. Lutkins, 85 Ill. App. 662.) In Baird & Warner, Inc. v. Roble, 250 Ill. App. 255, defendants had appeared by their attorney and filed a plea to the declaration, supported by an affidavit of meritorious defense. When the case was called for hearing, defendants' counsel was not present in court and judgment was entered against them. A motion to vacate the judgment was thereafter filed, supported by affidavits, showing that the attorney for defendants at and just prior to the time of the trial was suffering from a nervous disease complicated with mental disorders known as neuro psychosis, by reason whereof his mental faculties became impaired and he was wholly irresponsible and mentally incapacitated and unable to realize the status of the case or to follow the proceedings. Issue was taken and oral testimony heard on these alleged facts, with the result that the court vacated the judgment and its order was affirmed on appeal. In discussing the question the court said (p. 257):

"The court had a right to assume, and naturally would, that the failure of defendants to appear, either in person or by their attorney of record, and present their alleged meritorious defense, was due either to neglect or abandonment of the case. Neither was the fact. Such assumption would naturally include the presumption that the attorney was mentally capable of comprehending the situation and his duty in the premises, and so would notify defendants of the approaching trial. Surely had the contrary appeared to the court and the fact of defendants' ignorance thereof it would and should have prevented the court from entering judgment. That defendants did not

himself, and "* in the absence of special circumstances making it equitable for the client to have relief," have adhered to that rule. (Italics ours.) (Kern v. Strawbridge, 71 III. 415-418.) It is conceded that Finney's success will not relieve litigant of his own neglect nor that of his attorney. However, we regard the circumstances of this case such as would make it inequitable to allow this judgment to stand and there is authority for relieving a litigant against situations of this character. The question to be considered on appeal is whether there was an abuse of discretion by the trial court in setting aside the judgment. (Pitcairn v. Lumbye, 86 III. App. 662.) In Bailey v. Warner, Inc. v. Hobbs, 250 III. App. 158, defendants had appealed by their attorney and filed a plea to the declaration, supported by an affidavit of meritorious defense. When the case was called for hearing, defendants' counsel was not present in court and judgment was entered against them. A motion to vacate the judgment was therefore filed, supported by an affidavit, showing that the attorney for defendants at and just prior to the time of the trial was suffering from a nervous disease complicated with mental disorders known as manic psychosis, by reason whereof his mental faculties became impaired and he was wholly irresponsible and mentally incompetent and unable to realize the status of the case or to follow the proceedings. Issue was taken and oral testimony heard on these alleged facts, with the result that the court vacated the judgment and its order was affirmed on appeal. In discussing the question the court said (p. 257):

"The court had a right to assume, and naturally would, that the failure of defendants to appear, either in person or by their attorney of record, and present their alleged meritorious defense, was due either to neglect or abandonment of the case. Neither was the fact. Such assumption would naturally include the presumption that the attorney was mentally capable of comprehending the situation and his duty in the premises, and so would notify defendants of the approaching trial. Surely had the contrary appeared to the court and the fact of defendants' ignorance thereof it would and should have prevented the court from entering judgment. That defendants did not

appear to defend was clearly attributable to an excusable mistake. They had the right to expect that their attorney would attend to the case and notify them when it was reached for trial. His mental condition defeated that expectation and their intention to appear and defend. They were ignorant of it and so was the court. We think it cannot be doubted, therefore, that the court proceeded upon such a mistake as constitutes error in fact, and one that comes within the purview of such proceeding." (Italics ours.)

"It is not a case where the attorney was merely ill or failed through negligence to notify defendants of his condition or of the approaching trial. The essential facts are that defendants were not chargeable with knowledge, directly or through the attorney authorized to act for them, of the fact that the cause was reached for trial, and that the court naturally assumed in the regular course of procedure that they were. We deem it an excusable mistake without negligence."

It has frequently been held that the error in fact assignable under sec. 89 of the old statute (chap. 110, Smith Hurd Revised Statutes 1933) must be some fact unknown to the court at the time the judgment was rendered, as well as one which would have "precluded" the rendition of the judgment. (Chapman v. North American Life Ins. Co., 292 Ill. 179; Marabia v. Mary Thompson Hospital of Chicago, 309 Ill. 147; Loew v. Krauspe, 320 Ill. 244.) In Baird & Warner v. Roble, supra, the appellant sought to construe the word "precluded," as so used, to mean lack of jurisdiction, but the court pointed out that the word has no such exclusive meaning, and cited cases where misprision of the clerk which does not deprive the court of jurisdiction has been held such error of fact as comes within the scope of the motion, citing Domitski v. American Lindseed Co., 117 Ill. App. 292, later affirmed in 221 Ill. 161; Cramer v. Illinois Commercial Men's Ass'n, 260 Ill. 516, and various other decisions.

We think the reasoning in the Baird & Warner case and other decisions cited therein is applicable to the circumstances of this proceeding. There is no essential difference in principle between an attorney who is incapacitated by reason of mental disorders and one who is committed to jail. It requires no argument to assume that if the trial court had known that counsel for defendants was in jail

appear to defend on a clearly attributable to an excusable mistake. They had the right to expect that their money would be to be the same and notify them. Then it was revoked for trial. The material condition defeated the expectation and their injunction. [illegible] and defend. They were ignorant of it and no was the same. We think it is not be doubted, therefore, that the court proceeded upon such a mistake as constitutes error in fact, and one that ought right the purview of such proceedings." (Italics ours.)

"It is not a case where the attorney was merely ill or failed through negligence to notify defendants of his condition or of the approaching trial. The essential facts are that defendants were not charged with knowledge, directly or through the attorney authorized to act for them, of the fact that the case was reached for trial, and that the court mistakenly assumed in the regular course of proceedings that they were. We deem it an excusable mistake without negligence."

It has frequently been held that the error in fact assignable under sec. 80 of the old statute (chap. 110, smith Hurd Revised Statutes 1933) must be some fact unknown to the court at the time the judgment was rendered, as well as one which would have "precluded" the rendition of the judgment. (Thompson v. North American Life Ins. Co., 292 Ill. 179; Arnold v. Mary Thompson Hospital of Chicago, 309 Ill. 147; Loew v. Krueger, 320 Ill. 244.) In Baird & Warner v. Noble, supra, the appellant sought to construe the word "precluded," as so used, to mean lack of jurisdiction, but the court pointed out that the word has no such exclusive meaning, and cited cases where misprision of the clerk which does not deprive the court of jurisdiction has been held such error of fact as comes within the scope of the motion, citing Lowitski v. American Bankers Co., 117 Ill. App. 292, later affirmed in 221 Ill. 161; Greene v. Illinois Commercial Men's Assn., 260 Ill. 416, and various other decisions.

We think the reasoning in the Baird & Warner case and other decisions cited therein is applicable to the circumstances of this proceeding. There is no essential difference in principle between an attorney who is incapacitated by reason of mental disorders and one who is committed to jail. It requires no argument to assume that if the trial court had known that counsel for defendants was in jail

and unable to appear that the court would not have allowed the cause to proceed without them, but would have assumed that they were not notified. We think it was within the discretion of the court to set aside the judgments upon the showing made.

Plaintiffs' counsel argues that the petition does not show diligence on the part of defendants themselves. It is alleged, however, that their counsel had advised them that the case would not be reached for some time and they would not be required to do anything until he had notified them. The first information they had of the judgments was when a body execution was served on Koziol, Jr., and within a comparatively short time thereafter they took steps to investigate the circumstances and then retained counsel who presented their petition in August. This constitutes a sufficient showing of diligence. They did not delay the matter but acted as speedily as was possible under the circumstances and should not be charged with undue delay or neglect.

Under the statute the court had jurisdiction after the expiration of thirty days to set aside the judgment for reasons set forth in the petition. Therefore the order of the municipal court vacating the judgment and setting the cause for trial is affirmed.

ORDER VACATING JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

and unable to recover that the court would not have allowed the cause to proceed without them, but would have ascertained that they were not notified. In order to avoid the operation of the court to set aside the judgments upon the showing made.

Plaintiff's counsel argues that the petition does not show diligence on the part of defendants themselves. It is alleged, however, that their counsel had informed them that the case would not be reached for some time and they could not be required to do anything until he had notified them. The fact information they had of the judgments was from a body summons was served on Could, Jr., and within a comparatively short time thereafter they took steps to investigate the circumstances and then retained counsel who presented their petition in legal, this constitutes a sufficient showing of diligence. They did not delay the matter but acted as speedily as was possible under the circumstances and should not be charged with undue delay or negligence.

Under the statute the court had jurisdiction after the expiration of thirty days to set aside the judgments for reasons set forth in the petition. Therefore the order of the municipal court vacating the judgment and setting the cause for trial is affirmed.

COURT VACATING JUDGMENT AFFIRMED.

Gorman and Sullivan, JJ., concur.

39362

THELMA ROBERTS CAMPBELL,
Appellee,

v.

HORACE BRAND BUILDING
CORPORATION et al.,
Defendants.

On appeal of HORACE BRAND
BUILDING CORPORATION, a cor-
poration,
Appellant.

4A

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

295 I.A. 614[3]

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, Horace Brand Building Corporation, seeks to reverse a judgment for $355 entered against it on the verdict of a jury in an action brought by plaintiff, Thelma Roberts Campbell, to recover $710 for alleged damage by water to certain articles of wearing apparel and other personal property owned by her and stored under a purported contract of bailment in the basement of premises occupied in part by plaintiff as tenant of defendant. The proceeding was dismissed as to Mrs. Horace Brand and Erna B. Zeddies, who had also been named defendants.

Plaintiff's statement of claim alleged "that on or about April 28, 1934, for a good and valuable consideration, she entered into a contract of bailment with the defendants whereby the defendants agreed with plaintiff that if plaintiff would enter into a legally binding lease for a term of five months, beginning on May 1, 1934, with the defendant HORACE BRAND BUILDING CORPORATION, an Illinois corporation, for an apartment to be used by plaintiff as a

295IA

THELMA HOBERTS CAMPBELL,
Appellee,

v.

HORACE BRAND BUILDING
CORPORATION et al.,
Defendants.

On appeal of HORACE BRAND BUILDING CORPORATION, a corporation,
Appellant.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, Horace Brand Building Corporation, seeks to reverse a judgment for $355 entered against it on the verdict of a jury in an action brought by plaintiff, Thelma Roberts Campbell, to recover $710 for alleged damage by water to certain articles of wearing apparel and other personal property owned by her and stored under a purported contract of bailment in the basement of premises occupied in part by plaintiff as tenant of defendant. The proceeding was dismissed as to Mrs. Horace Brand and Mrs. H. Geddes, who had also been named defendants.

Plaintiff's statement of claim alleged "that on or about April 28, 1934, for a good and valuable consideration, she entered into a contract of bailment with the defendants whereby the defendants agreed with plaintiff that if plaintiff would enter into a legally binding lease for a term of five months, beginning on May 1, 1934, with the defendant HORACE BRAND BUILDING CORPORATION, an Illinois corporation, for an apartment to be used by plaintiff as a

residence, situated at 45 East Cedar Street in the City of Chicago, Illinois, which apartment was then and there operated by the defendants, that the defendants would store certain chattels for plaintiff which plaintiff then owned and was desirous of storing, as her bailees. Defendants further agreed in said contract of bailment to take good care of said chattels and return the same to plaintiff, on demand, in the same condition as when turned over to them.

"That pursuant to the terms of said contract of bailment, the plaintiff, on or about May 1, 1934, entered into said lease with the defendant Horace Brand Building Corporation and entered into possession of the said premises thereunder as a tenant of defendant Horace Brand Building Corporation; that on or about the time she entered the said premises, to-wit, on May 1, 1934, the plaintiff turned over to the defendants as baileesunder the aforesaid contract of bailment, certain chattels which the defendants then and there received under the terms of the said contract of bailment.

"Plaintiff alleges that thereafter, and contrary to the terms of the aforesaid contract of bailment, the defendants negligently and illegally permitted the aforesaid chattels to become wholly damaged and ruined beyond repair while in their custody and possession as bailees and that when plaintiff demanded the return of said property, defendants tendered said chattels in a wholly ruined and worthless condition; that defendants thereby breached said contract of bailment in that they did not take good care of said chattels, did not return or offer to return the same to her on demand in the same condition as when she turned them over to the defendants, but, on the contrary, tendered the same in a worthless condition, as aforesaid.

"By reason thereof, and as a direct and proximate result of defendants' breach of contract as aforesaid, the plaintiff has been wholly deprived of and lost the aforesaid chattels which she turned

residence, situated at 48 West Oakwood Street in the City of Chicago, Illinois, which apartment was then and there occupied by the defendants, that the defendants could store certain chattels for plaintiff which plaintiff then owned and was desirous of storing, as hereinafter. Defendants further agreed in said contract of bailment to take good care of said chattels and return the same to plaintiff, on demand, in the same condition as when turned over to them.

"That pursuant to the terms of said contract of bailment, the plaintiff, on or about May 1, 1924, entered into said lease with the Mandant Horse Brand Building Corporation and entered into possession of the said premises thereunder as a tenant of defendant Horse Brand Building Corporation; that on or about the time she entered the said premises, to-wit, on May 1, 1924, the plaintiff turned over to the defendants as bailee under the aforesaid contract of bailment, certain chattels which the defendants then and there received under the terms of the said contract of bailment.

"Plaintiff alleges that thereafter, and contrary to the terms of the aforesaid contract of bailment, the defendants negligently and illegally permitted the aforesaid chattels to become wholly damaged and ruined beyond repair while in their custody and possession as bailees and that when plaintiff demanded the return of said property, defendants tendered said chattels in a wholly ruined and worthless condition; that defendants thereby breached said contract of bailment in that they did not take good care of said chattels, did not return or offer to return the same to her on demand in the same condition as when she turned them over to the defendants, but, on the contrary, returned the same in a worthless condition, as aforesaid.

"By reason thereof, and as a direct and proximate result of defendants' breach of contract as aforesaid, the plaintiff has been wholly deprived of and lost the aforesaid chattels which she turned

over to the defendants under the contract of bailment as aforesaid, the following being a list thereof, together with the fair, reasonable and customary value of each item:

"Two trunks	$ 50
	35
Cloth coat trimmed in fur	125
Velvet suit trimmed in fur	125
Fur coat and muff	100
Skating suit	50
Piece of antique velvet	25
Velvet panel	20
Riding habit	15
Miscellaneous clothing	50
Miscellaneous items, including photographs, etc.	100
Damage to skating accessories	5
Dancing shoes	10
	$710"

The amended affidavit of defense of the Horace Brand Building Corporation alleged inter alia: "Defendant denies that any agreement was entered into for or on behalf of this corporation with the plaintiff except a certain indenture of lease, dated the 10th day of April, 1934, and alleges that all agreements by and between the plaintiff and this defendant were contained in said agreement.

"This defendant further alleges that in and by the clause or covenant numbered 'Third' in said indenture of lease that the plaintiff and this defendant did agree as follows:

> "'THIRD. That the party of the first part shall not be liable for any damage occasioned by failure to keep said premises in repair, and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes, or sewerage, or the bursting, leaking or running of any cistern, tank, washstand, water closet or waterpipe in, above, upon or about said building or premises, nor for damages occasioned by water, snow or ice being upon or coming through the roof, sky-light, trap door or otherwise, nor for any damages arising from acts or neglect of co-tenants or other occupants of the same building, or of any owners or occupants of adjacent or contiguous property.'

and that by virtue of said clause or covenant the plaintiff has no right or cause of action against this defendant by reason of any matter or thing alleged in plaintiff's statement of claim.

"This defendant further denies that any officer or other duly

over to the defendants under the contract of bailment as aforesaid, the following being a list thereof, together with the fair, reasonable and customary value of each item:

"Two trunks	$ 50
	35
Cloth coat trimmed in fur	125
Velvet suit trimmed in fur	125
Fur coat and muff	100
Skating suit	50
Piece of antique velvet	25
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and that by virtue of said clause or covenant the plaintiff has no right or cause of action against this defendant by reason of any matter or thing alleged in plaintiff's statement of claim.

"This defendant further denies that any officer or other duly

authorized agent of this corporation entered into any agreement of any kind or nature with the plaintiff except the agreement of indenture above referred to.

"Defendant further denies that it negligently or illegally permitted any chattels or property of the plaintiff to become damaged or ruined and denies that it had any custody or control over any chattels or property of the plaintiff as a bailment or otherwise and denies that it ever was a bailee of any chattels or property of the plaintiff."

It appeared that the Horace Brand Building Corporation was the owner of a building at 45 East Cedar Street, Chicago, in which a small apartment was vacant during the early part of April, 1934; that plaintiff inspected this apartment and a few days later returned and informed Mrs. Horace L. Brand, the wife of the president of the defendant corporation, that she would take same; that shortly thereafter a written lease of the apartment for a term of five months, commencing May 1, 1934, at a total rent of $250 was submitted to plaintiff and signed by her and also by the defendant corporation by its president, Horace L. Brand; that plaintiff moved into the apartment about the middle of April and after a few days the janitor removed to one of the sheds or lockers in the basement of the building, which were available for use by tenants as storerooms, the two trunks containing articles of clothing and other personal property owned by plaintiff, which she claims were "wholly damaged and ruined" by water. Plaintiff testified that before she signed the lease she informed the lessor, through conversations with Mrs. Brand, that the trunks contained valuable property and that Mrs. Brand in behalf of the lessor orally agreed that if plaintiff signed the lease of the apartment, such trunks and their contents would be safely stored and cared for. The evidence is conflicting as to whether it was

authorized agent of this corporation entered into any agreement of any kind or nature with the plaintiff except the agreement of indemnity above referred to.

"Defendant further denies that it negligently or illegally permitted any chattels or property of the plaintiff to become damaged or ruined and denies that it had any custody or control over any chattels or property of the plaintiff as a bailment or otherwise and denies that it ever was a bailee of any chattels or property of the plaintiff."

It appeared that the Lorraine Grand Building Corporation was the owner of a building at 60 East Oak Street, Chicago, in which a small apartment was vacant during the early part of April, 1934; that plaintiff inspected this apartment and a few days later returned and informed Mrs. Lorraine L. Grand, the wife of the president of the defendant corporation, that she would take same; that shortly thereafter a written lease of the apartment for a term of five months, commencing May 1, 1934, at a total rent of $[illegible] was submitted to plaintiff and signed by her and also by the defendant corporation by its president, Lorraine L. Grand; that plaintiff moved into the apartment about the middle of April and after a few days the janitor removed to one of the cribs or lockers in the basement of the building, which were available for use by tenants as storerooms, the two trunks containing articles of clothing and other personal property owned by plaintiff, which she claims were "wholly damaged and ruined" by water. Plaintiff testified that before she signed the lease she informed the lessor, through conversations with Mrs. Grand, that the trunks contained valuable property and that Mrs. Grand in behalf of the lessor orally agreed that if plaintiff signed the lease of the apartment, such trunks and their contents would be safely stored and cared for. The evidence is conflicting as to whether it was

Mrs. Brand or plaintiff who ordered or requested the janitor to remove the trunks from plaintiff's apartment to the storeroom in the basement. Plaintiff's version is that Mrs. Brand assumed full charge of the trunks and ordered the janitor to remove them from plaintiff's apartment and give them special storage. Mrs. Brand denies that the trunks were even mentioned to her or that she had anything to do with them. The janitor testified that plaintiff requested him to remove the trunks to her storage room in the basement, which he did. There is testimony in the record that plaintiff was warned by another tenant of the building that the basement was not a safe place to store valuable property. Sometime during the summer of 1934 water flooded the basement, and, according to plaintiff her trunks, which she found standing on end, had been immersed in the flood water. She testified further that when she opened the trunks she found their contents wet and mildewed and entirely beyond repair or restoration. She placed the value of the property in the trunks at $710 and one of her witnesses valued it at $1,000.

Plaintiff's claim supported solely by her own evidence amounts simply to this. She was looking for an apartment and saw a for-rent sign in the building in question owned by defendant. After inspecting the vacant apartment she saw the renting agent, Mrs. Brand. She claims in effect that she told Mrs. Brand that because of the lack of space in the apartment for her trunks she would only agree to enter into a lease for same if the lessor agreed to provide dry, safe and secure storage for her trunks containing her valuable winter wardrobe and return the trunks and contents to her in the same condition they were received. She further claims that Mrs. Brand as the agent of the lessor orally agreed to the contract of bailment on the foregoing terms.

Of the many grounds urged for reversal only two need be considered. Defendant insists that the verdict was against the manifest

Mrs. Brand or plaintiff who ordered or requested the janitor to remove the trunks from plaintiff's apartment to the storeroom in the basement. Plaintiff's version is that Mrs. Brand assumed full charge of the trunks and ordered the janitor to remove them from plaintiff's apartment and give them special storage. Mrs. Brand denies that the trunks were ever mentioned to her or that she had anything to do with them. The janitor testified that plaintiff requested him to remove the trunks to her storage room in the basement which he did. There is testimony in the record that plaintiff was warned by another tenant of the building that the basement was not a safe place to store valuable property. Sometime during the summer of 1934 water flooded the basement, and, according to plaintiff her trunks, which she found standing on and, had been immersed in the flood water. He testified further that when she opened the trunks she found their contents wet and ruined and entirely beyond repair or restoration. He placed the value of the property in the trunks at $710 and one of her witnesses valued it at $1,000.

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Of the many grounds urged for reversal only two need be considered. Defendant insists that the verdict was against the manifest

weight of the evidence. In determining this question it is important to analyze the probabilities of the situation, as well as the facts and circumstances in evidence. It must be borne in mind that under plaintiff's theory the total rental of $250 for the apartment for the full term of the lease did not constitute the whole or any part of the consideration for the alleged contract of bailment but that the sole consideration therefor was plaintiff's agreement to enter into the lease.

One would have to be overcredulous to believe that Mrs. Brand agreed in behalf of the lessor to assume responsibility for the safeguarding of plaintiff's supposedly valuable property of indeterminate worth without inspection or investigation to ascertain its condition or character on the sole consideration that plaintiff would sign a five month lease at a rental of $50 a month. It is a matter of common knowledge and experience that owners of apartment buildings in the City of Chicago such as defendant's furnish each of their tenants with a basement storeroom. There was evidence that there were such storerooms in the basement of this building. It is also a matter of common knowledge that such rooms are not provided for the safekeeping of valuable property belonging to tenants at the risk of the landlord, but rather for the storage of articles which have been outworn or at least not needed by the tenant for the time being in such tenant's apartment. Plaintiff did not testify that she at any time informed Mrs. Brand as to the value of the property she placed in the trunks. She might just as reasonably have placed in her trunks property worth $5,000 or $10,000, if she possessed same, and with equal ardor, in the event such property was damaged, attempt to charge defendant with the responsibility for its safekeeping. Is it at all probable that Mrs. Brand, in order to secure a tenant at a total rental of $250, would agree to a contract

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of bailment which imposed unlimited liability on the lessor?

Plaintiff's uncorroborated testimony as to the contract of bailment was denied by Mrs. Brand, who testified that the matter of the storage of the trunks by the lessor was not mentioned in her various conversations with plaintiff. Mrs. Brand's testimony was corroborated, as heretofore shown, by that of the janitor to the extent that he stated that it was plaintiff who requested him to remove the trunks from her apartment to her storeroom in the basement.

The entire idea of the alleged oral contract of bailment under all the facts and circumstances in evidence, coupled with the reasonable probabilities, is so preposterous, in our opinion, that it is inconceivable that such a proposition was even considered by either plaintiff or Mrs. Brand. We are impelled to hold that the verdict of the jury was against the manifest weight of the evidence.

In any event a careful examination discloses that there was no competent evidence in the record to show that Mrs. Brand had any authority to bind defendant to such a contract as the purported oral contract of bailment.

In the view we take of this cause we deem it unnecessary to discuss the other points urged.

For the reasons stated herein the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Friend, P. J., and Scanlan, J., concur.

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In the view we take of this cause we deem it unnecessary to discuss the other points urged.

For the reasons stated herein the judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Friend, P. J., and Gorman, J., concur.

39369

15A

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

ANNA WAGMAN,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

295 I.A. 614

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

December 11, 1935, the state's attorney of Cook county filed a complaint for injunction pursuant to "chapter 100-1/2 Smith-Hurd Ill. Rev. Stats. 1935," seeking to abate as a nuisance a house of prostitution, which it was alleged was conducted by the defendant, Anna Wagman. On December 23, 1935, the court directed the issuance of a temporary injunction restraining the defendant from maintaining such premises as a house of prostitution. May 14, 1936, an information was filed charging defendant with violation of the injunction. June 26, 1936, an order was entered adjudging the defendant guilty of contempt of court for such violation, fining her $100 and sentencing her to imprisonment in the county jail for a period of thirty days. This order included a direction to the clerk of the court to forthwith issue a mittimus to the sheriff commanding him to execute said order. The sheriff immediately took the defendant into custody. Thereafter she filed a notice of appeal and bond thereunder and obtained her release. That appeal was dismissed by the circuit court and on November 20, 1936, an order was entered on motion of the state's attorney "that a capias be issued immediately by the clerk of this court and *** that the sheriff take the said defendant, Anna Wagman, into custody

295I.A. 614

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PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

ANNA TAGMAN,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

December 11, 1936, the state's attorney of Cook county filed a complaint for injunction pursuant to Chapter 100-1/2 Smith-Hurd Ill. Rev. Stats. 1935," praying to abate as a nuisance a house of prostitution, which it was alleged was conducted by the defendant, Anna Tagman. On December 23, 1936, the court directed the issuance of a temporary injunction restraining the defendant from maintaining such premises as a house of prostitution. May 14, 1936, an information was filed charging defendant with violation of the injunction. June 26, 1936, an order was entered adjudging the defendant guilty of contempt of court for such violation, fining her $100 and sentencing her to imprisonment in the county jail for a period of thirty days. This order included a direction to the clerk of the court to forthwith issue a mittimus to the sheriff commanding him to execute said order. The sheriff immediately took the defendant into custody. Thereafter she filed a notice of appeal and bond thereunder and obtained her release. That appeal was dismissed by the circuit court and on November 20, 1936, an order was entered on motion of the state's attorney "that a capias be issued immediately by the clerk of this court and *** that the sheriff take the said defendant, Anna Tagman, into custody

on said capias and pursuant to judgment of this court as entered June 26, 1936." December 2, 1936, defendant filed a notice of appeal which purported to be an appeal from both the order of November 20, 1936, directing that the capias issue and that the sheriff take her into custody and from the judgment order of June 26, 1936, which found defendant guilty of contempt of court and fined and sentenced her.

It is only necessary to say as to defendant's attempt to review the judgment of June 26, 1936, by this purported appeal that she is precluded from so doing. Her original appeal from the judgment order was dismissed by the lower court because of her failure to pursue the necessary steps to prosecute it. It has been repeatedly held that a second appeal cannot be perfected from the same order or judgment and in any event her right to appeal from said judgment order was lost because of her failure to exercise it within ninety days as provided by the Civil Practice act. It is, therefore, unnecessary to consider the alleged errors assigned for the reversal of the judgment order of June 26, 1936.

The reasons urged for the reversal of the order of November 20, 1936, are stated in defendant's brief as follows: "The mittimus under the order of June 26, 1936, became functus officio in July, 1936, and was so recognized by the court and state's attorney on November 20, 1936. The sheriff was and is without power to arrest under such an order and the court was without jurisdiction on November 20, 1936, to order that a capias issue or to direct the sheriff to take defendant into custody.

"The Court below, the state's attorney and the sheriff had no power and no jurisdiction on November 20, 1936, to revive a dead mittimus and to give legal vitality to a writ after four terms had passed. The writ of June 26, 1936, was inoperative in November, 1936, and the Court had no power to revive it, especially where, as here,

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It is only necessary to say as to defendant's attempt to review the judgment of June 26, 1936, by this purported appeal that she is precluded from so doing. Her original appeal from the judgment order was dismissed by the lower court because of her failure to pursue the necessary steps to prosecute it. It has been repeatedly held that a second appeal cannot be perfected from the same order or judgment and in any event her right to appeal from said judgment order was lost because of her failure to exercise it within ninety days as provided by the civil practice act. It is, therefore, unnecessary to consider the alleged errors assigned for the reversal of the judgment order of June 26, 1936.

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"The Court below, the state's attorney and the sheriff had no power and no jurisdiction on November 20, 1936, to revive a dead mittimus and to give legal vitality to a writ after four terms had passed. The writ of June 26, 1936, was inoperative in November, 1936, and the court had no power to revive it, especially where, as here,

the first writ was partly served by imprisonment."

The theory of the state is that "this appeal is improper since it is from a nonreviewable order and is based upon conditions which go to the validity of the mittimi, which question is not available on review but is a question for habeas corpus;" and that "questions raised by the appellant as to the invalidity of the several mittimi are frivolous since the determination of the legality of a person's detention depends only upon the existence or non-existence of a valid judgment."

The judgment of June 26, 1936, being final and valid, the real question presented is whether the order of November 20, 1936, directing a capias to issue for the defendant and that the sheriff take her into custody is appealable. The sole purpose served by this order was to enforce the valid judgment of the court theretofore rendered. It is the established law of this state that objections to the process by which a person is imprisoned are not properly reviewable by appeal or writ of error but can only be availed of in a habeas corpus proceeding. In Marx v. The People, 204 Ill. 248, where an objection was urged to the process by which the defendant in that case was imprisoned, the Supreme court in holding that such objection does not properly arise upon writ of error, said at pp. 253, 254: "The question as to whether the plaintiff in error is confined now by any writ, or of a writ in such form as is required by law, is one that will properly arise when it is sought by habeas corpus to relieve him from illegal restraint. The issuing of the writ is no part of the judgment complained of and need not here be considered."

Even though it be assumed that the order of November 20, 1936, was a final determination reviewable by appeal, there is no merit in the contentions advanced by defendant since the propriety

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Even though it be assumed that the order of November 20, 1936, was a final determination reviewable by appeal, there is no merit in the contentions advanced by defendant since the propriety

of her detention and imprisonment is not to be determined by the validity of either the mittimus ordered June 26, 1936, under which she was originally taken into custody, or by the mittimus ordered November 20, 1936, under which she was imprisoned after the appeal perfected by her notice of appeal filed June 26, 1936, had been dismissed, but by the validity of the judgment which imposed the sentence upon her. While a commitment ought regularly to go with the defendant, its absence does not render the imprisonment unlawful, for the sentence is the real authority for holding the defendant. (Aderhold v. McCarthy, 65 Fed. (2nd) 452; Ex Parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Howard v. U. S., 75 Fed. 986; 34 L. R. A. 509; People v. Baker, 89 N. Y. 462; People v. Green, 281 Ill. 52, 117 N. E. 764; In re Moore, 14 Ohio Cir. Ct. R. 237.)

In People v. Green, supra, an original petition for mandamus was filed in the Supreme court to compel Hon. Theodore M. Green, circuit court judge, to expunge an order entered in a habeas corpus proceeding discharging one Robbins and to compel Evans, sheriff, to apprehend and imprison Robbins, pursuant to a conviction and sentence for selling liquor in anti-saloon territory. The writ of mandamus was ordered to issue. There the court said at pp. 61, 62:

"It was alleged by respondents in their answer that the sheriff, respondent Evans, did not have a mittimus or certified copy of the judgment in his hands or in his possession at the time Robbins was committed by him to jail under said judgments, and they argue that this was a sufficient ground in the habeas corpus proceeding for the discharge of the prisoner. Robbins was detained by virtue of the judgments of the county court, and those judgments were sufficient authority for his detention. A mittimus in each of the cases was only important to the officer as a direction to him to imprison Robbins and as evidence of the authority which the judgments gave. It is not necessary to discuss the proposition whether or not it was the duty of Evans, as sheriff, to have had a mittimus in his possession for his direction. The judgments were sufficient authority for the imprisonment of Robbins, and he would have no right to his release from imprisonment simply because the sheriff failed to arm himself with sufficient authority or direction as to such imprisonment, even if it be conceded that the law requires a mittimus in such case before committing the prisoner. The imprisonment in such case could have been legalized at any time by the issuance of a mittimus. As a matter of fact, there is no

of her detention and imprisonment is not to be determined by the validity or either the mittimus ordered June 26, 1926, under which she was originally taken into custody, or by the mittimus ordered November 22, 1926, under which she was imprisoned after the appeal prosecuted by her notice of appeal filed June 26, 1926, had been dismissed, but by the validity of the judgment which imposed the sentence upon her. While a commitment or mittimus is, with the defendant, its absence does not render the imprisonment unlawful, for the sentence is the real authority for holding the defendant. (Ex parte Hilton, 111 U. S. 1; Ex parte Bigelow, 113 U. S. 328; Mackenzie v. Hare, 239 U. S. 299; Ex parte Terry, 128 U. S. 289; Ex parte Dunn, 62 Fed. (2nd) 304; Ex parte Kirby, 54 Fed. 465; Ex parte Bakers, 60 N. Y. 465; People v. Green, 24 N. E. 809; People v. Baker, 96 N. Y. 340; People v. Green, 201 Ill. 32, 117 N. E. 766; In re Boots, 14 Ohio Cir. Ct. R. 327.)

In People v. Green, supra, an original petition for mandamus was filed in the supreme court to compel Hon. Theodore R. Green, circuit court judge, to expunge an order entered in a habeas corpus proceeding discharging one Hodges and to compel Vance, sheriff, to apprehend and imprison Hodges, pursuant to a conviction and sentence for selling liquor in anti-saloon territory. The writ of mandamus was ordered to issue. There the court said at pp. 61, 62:

> "It was alleged by respondents in their answer that the sheriff, respondent Vance, did not have a mittimus or certified copy of the judgment in his hands or in his possession at the time Hodges was committed by him to jail under said judgments, and they argue that this was a sufficient ground in the habeas corpus proceeding for the discharge of the prisoner. Hodges was detained by virtue of the judgments of the county court, and those judgments were sufficient authority for his detention. A mittimus in such of the cases was only transmitt to the officer as a direction to him to imprison Hodges and as evidence of the authority which the judgments gave. It is not necessary to discuss the proposition whether or not it was the duty of Vance, as sheriff, to have had a mittimus in his possession for his direction. The judgments were sufficient authority for the imprisonment of Hodges, and he could have no right to his release from imprisonment simply because the sheriff failed to arm himself with sufficient authority or direction as to such imprisonment, even if it be conceded that the law requires a mittimus in such cases before committing the prisoner. The imprisonment in such case could have been legalized at any time by the issuance of a mittimus. As a matter of fact, there is no

special requirement in our statute that a sheriff or other officer must be supplied with a mittimus after an order and judgment of conviction and sentence to jail have been entered by the court, and where the court has directed the sheriff, who is personally present, to commit the offender. There is authority, at any rate, for the proposition that a prisoner who has been legally and properly sentenced to prison cannot be released from prison merely because of an imperfection in the warrant for commitment, and if the prisoner is safely in the proper custody there is no office for a mittimus to perform. People v. Baker, 89 N. Y. 461; Howard v. United States, 34 L. R. A. 509, and cases cited."

Other points have been urged and considered but in the view we take of this matter we deem it unnecessary to discuss them.

For the reasons given the motion of the state's attorney, heretofore filed and reserved to hearing to dismiss this proceeding, purporting to be an appeal, is allowed.

PROCEEDING DISMISSED.

Friend, P. J., and Scanlan, J., concur.

special requirement in our statute that a sheriff or other officer must be supplied with a mittimus after an order and judgment of conviction and sentence to jail have been entered by the court, and where the court has directed the sheriff, who is personally present, to commit the offender. There is authority, at any rate, for the proposition that a prisoner who has been legally and properly sentenced to prison cannot be released from prison merely because of an imperfection in the warrant for commitment, and if the prisoner is safely in the proper custody there is no call for a mittimus to perform. People v. Keler, 89 N. Y. 4-1; Howard v. United States, 24 L. R. A. 809, and cases cited."

Other points have been urged and considered but in the view we take of this matter we deem it unnecessary to discuss them.

For the reasons given the motion of the state's attorney, heretofore filed and reserved to hearing to dismiss this proceeding, purporting to be an appeal, is allowed.

PROCEEDING DISMISSED.

Friend, P. J., and Scanlan, J., concur.

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CHICAGO SECURITIES CORPORATION,
a corporation, (plaintiff below),
Appellant,

v.

CLARENCE J. OLSEN et al.,
(defendants below).

CHARLES H. ALBERS, receiver of
LINCOLN TRUST & SAVINGS BANK,
(petitioner below),
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

295 I.A. 615

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On October 5, 1935, plaintiff filed its complaint in ejectment against Clarence J. Olsen, the owner of the premises in question, and ten other defendants who were tenants occupying apartments therein. On November 1, 1935, Olsen filed his answer denying that plaintiff was the owner of the premises mentioned in the complaint, that there was any valid tax deed issued to plaintiff, that defendant was guilty of unlawfully withholding the premises and that plaintiff had been in any way damaged by the defendant. On January 8, 1936, on plaintiff's motion and without notice, the ejectment suit was dismissed as to the defendant Olsen and default judgment was taken as to the remaining ten defendants. On October 21, 1936, Charles H. Albers as receiver of Lincoln Trust & Savings Bank (hereinafter for convenience referred to as petitioner) filed his petition in the nature of a writ of error coram nobis under sec. 72 of the Civil Practice act to vacate the judgment of January 8, 1936, to which petition plaintiff filed its answer November 7, 1936. On January 6, 1937, after hearing on the petition and answer, both of which were verified, an order was

CHICAGO SANITARY DISTRICT, a corporation, (plaintiff below),
Appellant,

v.

CLARENCE T. OLSEN et al., (defendants below).

CLARENCE H. [illegible], receiver of LINCOLN TRUST & SAVINGS BANK, (petitioner below),
Appellee.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT:

On October 8, 1935, plaintiff filed its complaint in ejectment against Clarence T. Olsen, the owner of the premises in question and ten other defendants who were tenants occupying apartments therein. On November 1, 1935, Olsen filed his answer denying that plaintiff was the owner of the premises mentioned in the complaint, that there was any valid tax deed issued to plaintiff, that defendant was guilty of unlawfully withholding the premises and that plaintiff had been in any way damaged by the defendant. On January 8, 1936, on plaintiff's motion and without notice, the ejectment suit was dismissed as to the defendant Olsen and default judgment was taken as to the remaining ten defendants. On October 21, 1936, Charles H. Albers as receiver of Lincoln Trust & Savings Bank (hereinafter for convenience referred to as petitioner) filed his petition in the nature of a writ of error coram nobis under sec. 72 of the Civil Practice act to vacate the judgment of January 8, 1936, to which petition plaintiff filed its answer November 7, 1936. On January 6, 1937, after hearing on the petition and answer, both of which were verified, an order was

entered vacating and setting aside the order of dismissal and the judgment order of January 8, 1936, and giving leave to Charles H. Albers, receiver, to file his appearance and answer to the complaint in ejectment. This appeal seeks to reverse the order of January 6, 1937.

The petition of Charles H. Albers, receiver of Lincoln Trust & Savings Bank, alleged substantially that at the time of the commencement of the action in ejectment Clarence J. Olsen was the owner in fee simple of the premises described in the complaint; that the premises were improved with a three-story brick building containing twenty-two apartments; that one of the occupants of the apartments were made parties defendant to the complaint along with Olsen and that ten others occupied apartments as tenants but were not made parties to the proceeding; that Clarence J. Olsen did not occupy the premises; that the complaint in ejectment did not allege that "Clarence J. Olsen claimed to be the owner in fee of said premises and failed by any fact alleged therein to distinguish between the claims of said tenants and of said Clarence J. Olsen;" that all of the defendants were served with process; that Clarence J. Olsen, by Litsinger, Healy, Reid & Bye, his attorneys, appeared and answered the complaint November 1, 1935; that the cause was assigned to the calendar of Judge John R. Caverly, and remained upon his calendar until the entry of the judgment; that Clarence J. Olsen conveyed the premises November 22, 1935, to William L. O'Connell, receiver of Lincoln Trust & Savings Bank, and that William L. O'Connell as such receiver was until his death the owner of said premises; that William L. O'Connell died July 24, 1936, and Charles H. Albers was on that date appointed successor receiver of Lincoln Trust & Savings Bank; that Albers gave bond and qualified as receiver and that he is now the qualified receiver of the bank and as such the owner in fee simple of said premises; that on January 8,

entered vacating and setting aside the order of dismissal and the judgment order of January 8, 1938, and giving leave to Charles H. Albers, receiver, to file his appearance and answer to the complaint in ejectment. This appeal seeks to reverse the order of January 8, 1937.

The petition of Charles H. Albers, receiver of Lincoln Trust & Savings Bank, alleged substantially that at the time of the commencement of the action in ejectment defendant Clarence T. Olson was the owner in fee simple of the premises described in the complaint; that the premises were improved with a three-story brick building containing twenty-two apartments; that one of the occupants of the apartments were made parties defendant to the complaint also, with Olson and that ten others occupied apartments as tenants but were not made parties to the proceeding; that defendant T. Olson did not occupy the premises; that the complaint in ejectment did not allege that "Clarence T. Olson claimed to be the owner in fee of said premises and filed by any fact alleged therein to distinguish between the claims of said tenants and of said Clarence T. Olson;" that all of the defendants were served with process; that Clarence T. Olson, by Kistinger, Healy, Reid & Rye, his attorneys, appeared and answered the complaint November 1, 1935; that the cause was assigned to the calendar of Judge John H. Gaverly, and remained upon his calendar until the entry of the judgment; that Clarence T. Olson conveyed the premises November 22, 1935, to William L. O'Connell, receiver of Lincoln Trust & Savings Bank, and that William L. O'Connell as such receiver was until his death the owner of said premises; that William L. O'Connell died July 24, 1936, and Charles H. Albers was on that date appointed successor receiver of Lincoln Trust & Savings Bank; that Albers gave bond and qualified as receiver and that he is now the qualified receiver of the bank and as such the owner in fee simple of said premises; that on January 8,

1936, plaintiff appeared before Judge Stanley H. Klarkowski and secured the entry of an order of default against the defendants other than Clarence J. Olsen; and that on the same day on motion of the attorney for plaintiff the following order of dismissal was entered:

"On motion of Verne B. Selle, solicitor for Chicago Securities Corporation, a corporation, plaintiff, for an order of dismissal against Clarence J. Olsen, defendant herein, the Court having been advised that the said Clarence J. Olsen was not in actual possession of the premises, or any part thereof, involved herein, and that he, by his attorneys, has only filed an answer of general denial.

"It is therefore ordered that this cause be dismissed as to the defendant, Clarence J. Olsen, without prejudice."

The petition to vacate further alleged that thereafter also on the same day Judge Stanley H. Klarkowski entered a default finding and judgment against the defendants other than Clarence J. Olsen; that neither Olsen nor his attorneys were notified of the intention of plaintiff to dismiss the action against him or to secure the entry of said judgment and had no knowledge or notice of said last mentioned proceedings until more than thirty days after the entry of the judgment; that plaintiff did not notify the other defendants of its motion to dismiss the action as to Olsen; that Olsen's answer to plaintiff's complaint was not a mere general denial but was a full and complete answer to all the facts alleged in said complaint; that petitioner has a good and meritorious defense in that the tax deed referred to in plaintiff's complaint, by virtue of which it claimed ownership of the premises, was void because of the failure to pay subsequent taxes, because there was no proper service of notice of the tax sale and because of failure to comply with sec. 212 of the Revenue act. The petition concluded with the prayer that the judgment entered January 8, 1936, be vacated, that the order dismissing the cause as to Olsen be vacated and that petitioner be permitted to appear and answer plaintiff's complaint as the assignee of said defendant Clarence J. Olsen.

1930, plaintiff presented before Judge Stanley N. Klarkowski and secured the entry of an order of default against the defendants other than Clarence J. Olsen; and that on the same day on motion of the attorney for plaintiff the following order of dismissal was entered:

"On motion of Verne E. Kalle, solicitor for Chicago Municipal Corporation, a corporation, plaintiff, for an order of dismissal against Clarence J. Olsen, defendant herein, the Court having been advised that the said Clarence J. Olsen has not in said possession of the premises, or any part thereof, involved herein, and that he, by his attorneys, has only filed an answer of general denial.

"It is therefore ordered that this cause be dismissed as to the defendant, Clarence J. Olsen, without prejudice."

The petition to vacate further alleged that thereafter also on the same day Judge Stanley N. Klarkowski entered a default finding and judgment against the defendants other than Clarence J. Olsen; that neither Olsen nor his attorneys were notified of the intention of plaintiff to dismiss the action against him or to secure the entry of said judgment and had no knowledge or notice of said last mentioned proceedings until more than thirty days after the entry of the judgment; that plaintiff did not notify the other defendants of its motion to dismiss the action as to Olsen; that Olsen's answer to plaintiff's complaint was not a mere general denial but was a full and complete answer to all the facts alleged in said complaint; that petitioner has a good and meritorious defense in that the tax deed referred to in plaintiff's complaint, by virtue of which it claimed ownership of the premises, was void because of the failure to pay subsequent taxes, because there was no proper service of notice of the tax sale and because of failure to comply with sec. 122 of the Revenue act. The petition concluded with the prayer that the judgment entered January 8, 1930, be vacated, that the order dismissing the cause as to Olsen be vacated and that petitioner be permitted to appear and answer plaintiff's complaint as the assignee of said defendant Clarence J. Olsen.

Plaintiff's answer to the petition to vacate, after admitting the material allegations thereof, averred inter alia that at the time of the commencement of the ejectment suit plaintiff claimed title in fee simple under a tax deed and "plaintiff was informed that Clarence J. Olsen claimed to be the owner of the premises and was in possession thereof through certain tenants;" that the petition to vacate "sets up no grounds for the setting aside of the judgment entered on January 8, 1936, as required by sec. 72 of the Civil Practice act;" that Charles H. Albers, receiver of Lincoln Trust & Savings Bank, is a stranger to the record; that William L. O'Connell and Charles H. Albers "had knowledged of the entry of this judgment by virtue of the fact that in the matter of the case of John B. Bobzien, successor trustee, v. Michael Schwartz, Circuit court case No. 35C 13149, which proceeding was a proceeding for the foreclosure of the premises involved herein, in which case John B. Bobzien, by Litsinger, Healy, Reid & Bye, its [his] attorneys, filed a petition on February 15, 1936, setting forth that the judgment in ejectment had been entered in this proceeding January 8, 1936, and praying that the plaintiff herein be enjoined from interfering with the collection of the rents, issues and profits from said premises;" that "William J. O'Connell was notified of the application for this injunctive order by service of notice upon Norman C. Barry, his attorney, and the injunctive order was granted;" that "the petitioner herein was guilty of laches in that he has permitted John B. Bobzien, as successor trustee, plaintiff in said foreclosure proceeding, to obtain this injunctive order and in the same proceeding permitted the plaintiff to go to a decree without the adjudication of the rights of the Chicago Securities Corporation, *** and in permitting the Chicago Securities Corporation to prosecute its appeal from certain orders in the foreclosure proceeding *** so that the Chicago Securities Corporation has relied upon its judgment in ejectment in this

Lehnhiff's answer to the petition in error, after admitting the material allegations thereof, averred inter alia that at the time of the commencement of the ejectment suit Lehnhiff claimed title in fee simple under a tax deed and plaintiff was informed that Clarence L. Olson claimed to be the owner of the premises and was in possession thereof through certain tenants; that the petition to vacate "was up on grounds for the setting aside of the judgment entered on January 7, 1926, as required by sec. 72 of the Civil Practice Act;" that Theodore H. Ibsen, receiver of Lincoln Trust & Savings Bank, is a stranger to the record; that William I. O'Donnell and Theodore H. Ibsen "had knowledge of the entry of this judgment by virtue of the fact that in the matter of the case of John T. Lehnhiff, successor trustee, v. Nicholas Schmidt, Circuit Court case no. 320 1212, which proceeding was a proceeding for the foreclosure of the premises involved herein, in which case John T. Robins, by Lehnhiff, their, said [illegible], the [his] attorney, filed a petition on January 12, 1926, setting forth that the judgment in ejectment had been entered in this proceeding January 8, 1926, and praying that the plaintiff herein be enjoined from interfering with the collection of the rents, issues and profits from said premises;" that William J. O'Donnell was notified of the application for this injunctive order by service of notice upon Norman J. Barry, his attorney, and the injunctive order was granted; that "the petitioner herein was guilty of laches in that he has permitted John E. Robins, as successor trustee, plaintiff in said foreclosure proceeding, to obtain this injunctive order and in the same proceeding permitted the plaintiff to go to a decree without the adjudication of the rights of the Chicago Countries Corporation, ** and in permitting the Chicago Countries Corporation to prosecute its appeal from certain orders in the foreclosure proceeding ** so that the Chicago Countries Corporation has relied upon its judgment in ejectment in this

cause and expended moneys in connection with the matter of Bobzien v. Schwartz and the appeals involved therein with the knowledge of William L. O'Connell, trustee, and Charles H. Albers, successor trustee." Plaintiff's answer to the petition to vacate asked that same be denied.

Plaintiff's contentions as stated in its brief are "that after the expiration of thirty days, the court was without jurisdiction to vacate and set aside its final judgment order of January 6 [8], 1936, and that the petition filed by the petitioner and appellee did not set up facts giving the court jurisdiction to set aside the final judgment and that Charles H. Albers, receiver, a stranger to the record, had no right to file such a petition and that the petition and answer show laches on the part of Charles H. Albers, receiver."

The errors of fact alleged by petitioner and upon which he relies for the affirmance of the order of the trial court vacating the aforesaid order of dismissal and the judgment in ejectment are that "the fact that Olsen was the owner and the other defendants his tenants was a fact which, if known to the Court, would have prevented the dismissal of the suit as to Olsen and the entry of judgment against his tenants;" and that "the fact that no notice of the motion to dismiss and for judgment was given to Olsen was a fact which if known to the Court would have prevented the entry of the judgment and the order of dismissal."

It appears from the pleadings that when plaintiff filed its complaint it had knowledge that Olsen was the owner in fee simple of the premises and was in possession thereof through his tenants, some of whom were named as defendants and others not; that on November 1, 1935, Olsen filed his appearance and a sufficient answer to the complaint; that neither plaintiff's complaint nor Olsen's answer contained any allegation that Olsen was the owner of the

cause and expended money in connection with the matter of Johnson v. Olmstead and the appeals involved therein with the knowledge of William L. O'Donnell, trustee, and Charles H. Albers, successor trustee." Plaintiff's answer to the petition to vacate asked that same be denied.

Plaintiff's contentions as stated in its brief are "that after the expiration of thirty days, the court was without jurisdiction to vacate and set aside its final judgment order of January 6 [8], 1930, and that the petition filed by the petitioner and appellee did not set up facts giving the court jurisdiction to set aside the final judgment and that Charles L. Albers, receiver, a stranger to the record, had no right to file such a petition and that the petition and answer show laches on the part of Charles H. Albers, receiver."

The errors of fact alleged by petitioner and upon which he relies for the affirmance of the order of the trial court vacating the aforesaid order of dismissal and the judgment in ejectment are that "the fact that Olsen was the owner and the other defendants his tenants was a fact which, if known to the Court, would have prevented the dismissal of the suit as to Olsen and the entry of judgment against his tenants;" and that "the fact that the notice of the motion to dismiss and for judgment was given to Olsen was a fact which if known to the Court would have prevented the entry of the judgment and the order of dismissal."

It appears from the pleadings that when plaintiff filed its complaint it had knowledge that Olsen was the owner in fee simple of the premises and was in possession thereof through his tenants, some of whom were named as defendants and others not; that on November 1, 1929, Olsen filed his appearance and a sufficient answer to the complaint; that neither plaintiff's complaint nor Olsen's answer contained any allegation that Olsen was the owner of the

premises; that notwithstanding the cause was assigned to the calendar of Judge John R. Caverly, plaintiff, by its attorney, appeared before Judge Stanley H. Klarkowski, January 8, 1936, without notice to Olsen and moved to dismiss the cause as to him; that such motion was allowed and an order dismissing the cause as to Olsen was entered which recited that the court had been advised "that the said Clarence J. Olsen is not in actual possession of the premises *** and that he, by his attorneys, has only filed an answer of general denial;" and that on the same day plaintiff caused the tenant defendants to be defaulted and judgment entered against them in favor of plaintiff.

The error of fact which may be assigned by motion in the nature of a writ of error coram nobis under sec. 72 of the Civil Practice act must be some fact unknown to the court, which, if known, would have precluded the entry of the judgment. Olsen, the owner of the premises, filed his answer in which he took issue upon all the material allegations of the complaint and undertook the defense of the ejectment proceeding. The tenant defendants did not appear or file answers therein. With the record in this condition and with nothing in said record to inform the court that Olsen was the owner of the property, plaintiff appeared before a judge other than the one to whom the case had been assigned, at a time when the cause was not regularly called for trial and without notice as required by the rules of the Circuit court, procured the entry of the order dismissing the cause as to Olsen, the real party in interest, and the entry of a judgment by default against the tenants, whose only interest in the property in so far as the legal title thereto was concerned was as the representatives of Olsen. Can it be seriously urged that if the court had known that Olsen was the owner of the property and the other defendants were merely his tenants the order of dismissal as to him and the judgment in ejectment, nominally against his tenants but in reality

premises; that notwithstanding the cause was assigned to the out-
order of Judge John R. Severly, plaintiff, by his attorney, appeared
before Judge Stanley K. Lichtenwalter, January 5, 1936, without notice
to Olsen and moved to dismiss the cause as to him; that such motion
was allowed and an order dismissing the cause as to Olsen was entered
which recited that the court had been advised "that the said defendant
T. Olsen is not in actual possession of the premises" and that he,
by his attorney, had only filed an answer of general denial;" and
that on the same day plaintiff entered the default defendants to be
defaulted and judgment entered against them in favor of plaintiff.

The error of fact which may be corrected by motion in the
nature of a writ of error coram nobis under sec. 72 of the civil
practice act must be some fact unknown to the court, which, if known,
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the premises, filed his answer in which he took issue upon all the
material allegations of the complaint and stock the defense of
the ejectment proceeding. The tenant defendants did not appear or file
answers therein. With the record in this condition and with nothing
in said record to inform the court that Olsen was the owner of the
property, plaintiff appeared before a judge other than the one to
whom the case had been assigned, at a time when the cause was not
regularly called for trial and without notice as required by the rules
of the circuit court, procured the entry of the order dismissing the
cause as to Olsen, the real party in interest, and the entry of a
judgment by default against the tenants, whose only interest in the
property in so far as the legal title thereto was concerned was as the
representatives of Olsen. Even it be seriously urged that if the court
had known that Olsen was the owner of the property and the other de-
fendants were merely his tenants the order of dismissal as to him and
the judgment in ejectment, nominally against his tenants but in reality

against him, would have been entered? Surely the court's lack of knowledge that Olsen was the owner of the property and that the other defendants were his tenants is an error of fact within the contemplation of sec. 72 of the Practice act. Such knowledge by the court must necessarily have precluded the entry of the judgment.

It is also urged by petitioner that the fact that no notice was given to Olsen or his attorneys of plaintiff's motions to dismiss as to him and for default judgment against the tenant defendants was a fact which, if known to the court, would have prevented the entry of the order of dismissal and the judgment. Olsen was properly in court, as has been shown, having filed his appearance and a sufficient answer to the complaint. His right to notice under the rules of the Circuit court is not and cannot be questioned. If plaintiff's failure to give him the required notice had been known to the court, it is inconceivable that the order of dismissal as to him and the default judgment as to the other defendants would have been entered. Plaintiff advances the argument that the court, taking judicial notice of its own records, must have been aware of the lack of notice to Olsen. We prefer to view the entry of the order of dismissal and the judgment order in the light of a belief on the part of the court that its rules had been complied with rather than that the court knowingly violated its own rules. Where, as here, the circumstances were such as to require specific notice the law is settled that a motion in the nature of a writ of error coram nobis will lie to vacate an order or judgment rendered without such notice. In Jacobson v. Ashkinaze, 337 Ill. 141, defendant's attorney was replaced by another attorney without the knowledge or authorization of defendant. The case had been dismissed but later reinstated and a default judgment entered after notice to defendant's unauthorized attorney but not to defendant himself. In holding that the motion in the nature of a writ of error

against him, would have been averted? Surely, the court's lack of knowledge that Olsen was the owner of the property and that the other defendants were his tenants is an error of fact within the contemplation of sec. 72 of the Judicial act. Such knowledge by the court must necessarily have precluded the entry of the judgment.

It is also urged by petitioner that the fact that no notice was given to Olsen or his attorneys of plaintiff's motions to dismiss as to him and for default judgment against the tenant defendants was a fact which, if known to the court, would have prevented the entry of the order of dismissal and the judgment. Olsen was properly in court, as has been shown, having filed his appearance and a sufficient answer to the complaint. His right to notice under the rules of the circuit court is not and cannot be questioned. If plaintiff's failure to give him the required notice had been known to the court, it is inconceivable that the order of dismissal as to him and the default judgment as to the other defendants would have been entered. Plaintiff advances the argument that the court, taking judicial notice of its own records, must have been aware of the lack of notice to Olsen. We prefer to view the entry of the order of dismissal and the judgment order in the light of a belief on the part of the court that its rules had been complied with rather than that the court knowingly violated its own rules. Here, as here, the circumstances were such as to require specific notice the law is settled that a motion in the nature of a writ of error coram nobis will lie to vacate an order or judgment rendered without such notice. In Jacobson v. Lehmann, 337 Ill. 111, defendant's attorney was replaced by another attorney without the knowledge or authorization of defendant. The case had been dismissed but later reinstated and a default judgment entered after notice to defendant's unauthorized attorney but not to defendant himself. In holding that the motion in the nature of a writ of error

coram nobis was the appropriate remedy to vacate the default judgment after the expiration of the term at which it was entered, the court said at pp. 146, 148 and 149:

"The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law. ***

"Beach did not withdraw his appearance as the attorney for the plaintiff in error [defendant] either by his client's consent or the court's permission. Elliott [the attorney sought to be substituted] had no authority to represent the plaintiff in error and the latter had no notice or knowledge of the substitution. To charge the plaintiff in error with notice, actual or constructive, of the ex parte trial, notice, either to Beach the attorney or to the plaintiff in error himself, of the motion to vacate the order of October 11, 1920, striking the cause from the docket and to reinstate the cause, was necessary. No such notice was given to either of them. The notice to Elliott of that motion was of no avail because he did not represent the plaintiff in error. These matters of fact did not appear of record and were unknown to the court at the time it reinstated the cause on its docket. Obviously, if these facts had been known the court would not have rendered judgment against a party who had no notice of the reinstatement of the cause and was not chargeable with such notice."

In Swierez v. Napelka, 259 Ill. App. 262, where this court affirmed an order of the Circuit court which vacated a default judgment at a subsequent term, it was said at pp. 265 and 266:

"In the instant case the motion of the defendants to vacate the judgment set up that the court, in entering the default and judgment was not aware of the fact that no notice of the application for such order and judgment had been served on defendants' counsel. The purpose of the motion under section 89 is to bring before the court entering the judgment matters of fact not appearing of record. We must presume that the court was familiar with its rules and if there was error in construing them by the trial court, the error was one of law and not of fact. Cramer v. Illinois Commercial Men's Ass'n, *** [260 Ill. 516]. But the fact which the court was not apprised of was that no notice had been given to counsel for defendants, that application would be made for default and judgment. This fact did not appear of record and warranted the court, in the instant case, in allowing defendants' motion. Jacobson v. Ashkinaze, 337 Ill. 141."

It follows that if Olsen was still the owner of the premises at the time the order of dismissal and the judgment were entered and if the motion to vacate under sec. 72 of the Civil Practice act had been

coram nobis was the appropriate remedy to vacate the default judgment after the expiration of the term at which it was entered, the court said at pp. 146, 148 and 149:

"The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this state, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the petitioner to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law. **

"Beach did not withdraw his appearance as the attorney for the plaintiff in error [defendant] either by his client's consent or the court's permission. Elliott [the attorney sought to be substituted] had no authority to represent the plaintiff in error and the latter had no notice or knowledge of the substitution. To charge the plaintiff in error with notice, actual or constructive, of the ex parte trial, notice, either to Beach the attorney or to the plaintiff in error himself, of the motion to vacate the order of October 11, 1880, striking the cause from the docket and to reinstate the cause, was necessary. No such notice was given to either of them. The notice to Elliott of that motion was of no avail because he did not represent the plaintiff in error. These matters of fact did not appear of record and were unknown to the court at the time it reinstated the cause on its docket. Obviously, if these facts had been known the court would not have rendered judgment against a party who had no notice of the reinstatement of the cause and was not chargeable with such notice."

In Bulcken v. Republic, 209 Ill. App. 362, where this court affirmed an order of the Circuit court which vacated a default judgment at a subsequent term, it was said at pp. 366 and 368:

"In the instant case the motion of the defendants to vacate the judgment set up that the court, in entering the default and judgment was not aware of the fact that no notice of the application for such order and judgment had been served on defendants' counsel. The purpose of the motion under section 89 is to bring before the court entering the judgment matters of fact not appearing of record. We must presume that the court was familiar with its rules and if there was error in constituting them by the trial court, the error was one of law and not of fact. Gregory v. Illinois Commercial Bank, *** [200 Ill. 216]. But the fact which the court was not apprised of was that no notice had been given to counsel for defendants, that application would be made for default and judgment. While it did not appear of record and warranted the court, in the instant case, in allowing defendants' motion. Jacobson v. Aldridge, 237 Ill. 141."

It follows that if Bulcken was still the owner of the premises at the time the order of dismissal and the judgments were entered and if the motion to vacate under sec. 72 of the Civil Practice act had be

presented by him, the errors of fact heretofore indicated would have warranted the court in vacating such order of dismissal and judgment. But plaintiff questions the right of Albers, receiver, "a stranger to the record," to file a motion to vacate in the nature of a writ of error coram nobis more than thirty days after the entry of said order of dismissal and judgment and insists that in any event Albers was guilty of laches.

In our opinion Albers, receiver, had a legal right to file the petition to vacate and the court properly allowed same. Although Olsen was the owner of the property at the time the suit was started and at the time he filed his answer, he thereafter conveyed the property to O'Connell, receiver of Lincoln Trust & Savings Bank, but O'Connell was not substituted for Olsen as a party to the ejectment proceeding, so that at the time of the dismissal of the action as to him, Olsen was still the party defendant representing the ownership of the property, which necessarily would have to be determined as of the date of the commencement of the suit. He was entitled to defend the case in his own behalf or in behalf of anyone to whom he transferred the property during its pendency, and O'Connell as receiver, having acquired title to the property during the pendency of the cause, was, under the doctrine of lis pendens, bound by its outcome. The petitioner, the successor to O'Connell as receiver of Lincoln Trust & Savings Bank, acquired title to the premises and all his predecessor's rights and obligations in connection therewith and is vitally interested in defending the ejectment suit as the holder of the legal title to such premises and the landlord of the tenants against whom the default judgment was entered. Since petitioner is now the real party in interest and under the doctrine of lis pendens also bound by the order of dismissal as to Olsen and the default judgment against the tenant defendants, it would seem unquestionable that it is his right to be substituted in the place of Olsen and per-

presented by him, the errors of fact heretofore indicated would have warranted the court in vacating such order of dismissal and judgment. But plaintiff questions the right of Ibere, receiver, "a stranger to the record," to file a motion to vacate in the nature of a writ of error coram nobis more than thirty days after the entry of said order of dismissal and judgment and insists that in any event Ibere was guilty of laches.

In our opinion Ibere, receiver, had a legal right to file the petition to vacate and the court properly allowed same. Although Olsen was the owner of the property at the time the suit was started and at the time he filed his answer, he thereafter conveyed the property to O'Donnell, receiver of Lincoln Trust & Savings Bank, but O'Donnell was not substituted for Olsen as a party to the litigation proceeding, so that at the time of the dismissal of the action as to him, Olsen was still the party defendant representing the ownership of the property, which necessarily would have to be determined as of the date of the commencement of the suit. He was entitled to defend the case in his own behalf or in behalf of anyone to whom he transferred the property during its pendency, and O'Donnell as receiver, having acquired title to the property during the pendency of the cause, was, under the doctrine of lis pendens, bound by its outcome. The petitioner, the successor to O'Donnell as receiver of Lincoln Trust & Savings Bank, acquired title to the premises and all his predecessor's rights and obligations in connection therewith and is vitally interested in defending the litigation such as the holder of the legal title to such premises and the landlord of the tenants against whom the default judgment was entered. Since petitioner is now the real party in interest and under the doctrine of lis pendens also bound by the order of dismissal as to Olsen and the default judgment against the tenant defendants, it would seem unquestionable that it is his right to be substituted in the place of Olsen and por-

mitted to defend the ejectment proceeding.

As to the question of laches it is sufficient to state that the devious method employed to procure the judgment in ejectment constituted a flagrant imposition upon the court and precludes plaintiff from the benefit of any equitable defenses to the motion to vacate that it might otherwise have had.

Such other points as have been urged have been considered, but in the view we take of this cause we deem further discussion unnecessary.

For the reasons stated herein the order of the Circuit court of January 6, 1937, is affirmed.

AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

mitted to defend the ejectment proceeding.

As to the question of laches it is sufficient to state that the devious method employed to procure the judgment in ejectment constituted a flagrant imposition upon the court and precluded plaintiff from the benefit of any equitable defenses to the motion to vacate that it might otherwise have had.

Much other points as have been urged have been considered, but in the view we take of this case we deem further discussion unnecessary.

For the reasons stated herein the order of the Circuit court of January 6, 1937, is affirmed.

AFFIRMED.

Friend, P. J., and Beaman, J., concur.

39681

MAX GOLDSTEIN,
Appellee,

v.

ELICK PHILLIPS and
PHILLIPS JEWELRY STORE,
Inc., a corporation,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

295 I.A. 615

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $4,000 entered upon the verdict of a jury in an action for malicious prosecution brought by plaintiff, Max Goldstein, against Elick Phillips and Phillips Jewelry Store, Inc., defendants. In answer to the special interrogatory, "Do you believe that the defendants in this cause willfully, wantonly and maliciously caused the arrest and prosecution of plaintiff?" the jury answered, "Yes." No question is raised on the pleading.

Defendants' theory as stated in their brief is "that Goldstein left Phillips' employment and opened a jewelry store of his own under very suspicious circumstances. Elick Phillips went to his attorney, Irving Block, and stated his suspicions. He made a full disclosure to his attorney at the time and was told that the facts which he then disclosed were not sufficient to warrant causing the arrest of plaintiff Goldstein. After consulting his attorney, Elick Phillips took no further action in the matter whatever on his own account. The lawyer personally investigated and concluded that Goldstein had stolen Phillips' property. The lawyer took Mr. Phillips to the police station, told Phillips to sign the complaint and made all arrangements for tha arrest."

295 I.A. 615

MAX GOLDSTEIN,
Appellee,

v.

MILES PHILLIPS and
PHILLIPS JEWELRY STORE,
Inc., a corporation,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $4,000 entered upon the verdict of a jury in an action for malicious prosecution brought by plaintiff, Max Goldstein, against Miles Phillips and Phillips Jewelry Store, Inc., defendants. In answer to the special interrogatory, "Do you believe that the defendants in this cause willfully, wantonly and maliciously caused the arrest and prosecution of plaintiff?" the jury answered, "Yes." No question is raised on the pleading.

Defendants' theory as stated in their brief is "that Goldstein left Phillips' employment and opened a jewelry store of his own under very suspicious circumstances. Miles Phillips went to his attorney, Irving Block, and stated his suspicions. He made a full disclosure to his attorney at the time and was told that the facts which he then disclosed were not sufficient to warrant causing the arrest of plaintiff Goldstein. After consulting his attorney, Miles Phillips took no further action in the matter whatever on his own account. The lawyer personally investigated and concluded that Goldstein had stolen Phillips' property. The lawyer took Mr. Phillips to the police station, told Phillips to sign the complaint and made all arrangements for the arrest."

Defendants contend that they presented a complete defense in that Elick Phillips made a full and truthful statement of the facts within his knowledge concerning the plaintiff to a competent attorney and was advised that there was probable cause for a criminal prosecution against Goldstein; and that in any event the amount of damages awarded is excessive.

To sustain the judgment plaintiff urges that the facts and circumstances in evidence are such as to preclude the defendant from invoking the defense of advice of counsel; that defendants' prosecution of plaintiff was without probable cause and actuated by malicious motives; that the damages awarded plaintiff are not excessive; and that the verdict of the jury should not be set aside unless clearly contrary to the weight of the evidence.

On November 19, 1935, the defendant Elick Phillips appeared in the Municipal court and swore to a complaint charging plaintiff with the theft of a certain Bulova watch belonging to defendants. Goldstein was arrested December 26, 1935, gave bond for his appearance and after a hearing on January 13, 1936, he was found not guilty of the offense and discharged. Phillips conducted a jewelry store for many years at 1429 Milwaukee avenue and although the business was incorporated under the name of Phillips Jewelry Store, Inc., about 1932, he testified that "in reality" it was his. When plaintiff left school he went to work at Phillips's store as an errand boy at a salary of $15 a week. Later his salary was increased to $20 a week and he worked continuously for Phillips for ten years as a trusted employee, being allowed access to the safe as well as to all diamonds, watches, jewelry and money in the store. During all of that time his honesty was never questioned. In the early part of September, 1935, plaintiff left defendants' employment and with his brother opened up a jewelry store at 709 W. 63rd street, with money they had saved. Shortly after Goldstein quit his job with defendants, Phillips checked his

Defendants contend that they presented a complete defense in that Alex Phillips made a full and truthful statement of the facts within his knowledge concerning the plaintiff to a competent attorney and was advised that there was probable cause for a criminal prosecution against Goldstein; and that in any event the amount of damages awarded is excessive.

To sustain the judgment plaintiff urges that the facts and circumstances in evidence are such as to preclude the defendant from invoking the defense of advice of counsel; that defendants' prosecution of plaintiff was without probable cause and actuated by malicious motives; that the damages awarded plaintiff are not excessive; and that the verdict of the jury should not be set aside unless clearly contrary to the weight of the evidence.

On November 1?, 1938, the defendant Alex Phillips appeared in the Municipal court and swore to a complaint charging plaintiff with the theft of a certain Bulova watch belonging to defendants. Goldstein was arrested December 2?, 1938, gave bond for his appearance and after a hearing on January 1?, 1939, he was found not guilty of the offense and discharged. Phillips conducted a jewelry store for many years at 1829 Milwaukee avenue and although the business was incorporated under the name of Phillips Jewelry Store, Inc., about 1932, he testified that "in reality" it was his. When plaintiff left school he went to work at Phillips's store as an errand boy at a salary of $18 a week. Later his salary was increased to $20 a week and he worked continuously for Phillips for ten years as a trusted employee, being allowed access to the safe as well as to all diamonds, watches, jewelry and money in the store. During all of that time his honesty was never questioned. In the early part of September, 1938, plaintiff left defendants' employment and with his brother opened up a jewelry store at 709 N. 63rd street, with money they had saved. Shortly after Goldstein quit his job with defendants, Phillips checked his

stock. He testified that he discovered that a large number of watches and lavallieres were missing and that he suspected Goldstein of stealing them. Phillips, according to his testimony, then consulted attorney Block and "told him the story." Attorney Block did not at that time advise prosecution. The evidence is conflicting as to the facts leading up to the sale of the watch in question by plaintiff, but it is undisputed that, with the approval of Phillips, attorney Block purchased a Bulova watch bearing case number 5256218 at Goldstein's store on December 6, 1935. Block stated that on a prior occasion he had visited Goldstein's store and had been shown a number of Bulova watches, one of which bore the identical case number as the watch which he later purchased. Goldstein testified that the only time attorney Block visited his store was when he actually purchased the watch but that sometime prior thereto an elderly man, who claimed "to be the father of Mr. Block," visited his store and said he wanted to purchase a Bulova watch; that upon being informed that none were carried in stock, he requested that such a watch be ordered for him and he would call for it later; that a Bulova watch to fill this order was procured from one Spieler, who was also in the jewelry business; and that the "elderly" Block did not return for same but that attorney Block did and purchased and paid for the Bulova watch procured from said Spieler. Attorney Block communicated with the Bulova Watch Company in New York and was advised that the watch manufactured by that company, bearing the aforesaid case number, "was shipped to E. Phillips in Chicago." As to what occurred thereafter Block testified as follows:

"Upon getting that letter from the Bulova people, telling me that that particular watch had been sold to Mr. Phillips, I called Mr. Phillips again and discussed the matter in detail with him. I asked him to check up as close as he could as to the date he had purchased it. He examined his records and reported back to me that it was approximately on the first of April, 1935; that so far as he could see the watch had been billed and paid for but that he had never sold it through the store. I also discussed

stock. He testified that he discovered that a large number of watches and lavalliéres were missing and that he suspected Goldstein of stealing them. Phillips, according to his testimony, then consulted attorney Block and "told him the story." Attorney Block did not at that time advise prosecution. The evidence is conflicting as to the facts leading up to the sale of the watch in question by plaintiff, but it is undisputed that, with the approval of Phillips, attorney Block purchased a Bulova watch bearing case number 888828 at Goldstein's store on December 6, 1935. Block stated that on a prior occasion he had visited Goldstein's store and had been shown a number of Bulova watches, one of which bore the identical case number as the watch which he later purchased. Goldstein testified that the only time attorney Block visited his store was when he actually purchased the watch but that something prior thereto an elderly man, who claimed "to be the father of Mr. Block," visited his store and said he wanted to purchase a Bulova watch; that upon being informed that none were carried in stock, he requested that such a watch be ordered for him and he would call for it later; that a Bulova watch to fill this order was procured from one Spielser, who was also in the jewelry business; and that the "elderly" Block did not return for some time but that attorney Block did and purchased and paid for the Bulova watch procured from said Spielser. Attorney Block communicated with the Bulova watch company in New York and was advised that the watch manufactured by that company, bearing the aforesaid case number, "was shipped to R. Phillips in Chicago." As to what occurred thereafter Block testified as follows:

"Upon getting that letter from the Bulova people, telling me that that particular watch had been sold to Mr. Phillips, I called Mr. Phillips again and discussed the matter in detail with him. I asked him to check up as close as he could as to the date he had purchased it. He examined his records and reported back to me that it was approximately on the first of April, 1935; that so far as he could see the watch had been billed and paid for but that he had never sold it through the store. I also discussed

with him the proposition of certain lavallieres that he said were missing. I asked him to tell me about those and he told me he had purchased four diamond lavallieres; that they were unusual items which would not in the normal course of trade sell or sell fast and would be there for some time; that he went to take one of the lavallieres to his daughter for a birthday present and found that some of the lavallieres were missing and he felt sure that one lavalliere he had seen in Goldstein's place was one of them. I wrote a letter to Mr. Clorfene, one of the assistant State's Attorneys, and I recommended to Mr. Phillips that he go to see Mr. Clorfene and gave him a letter of introduction. He came back and told me he could not obtain a search warrant; that he would have to go to 11th and State rather than the Criminal Court building to obtain a warrant. *** so we took out a warrant for the larceny of this watch. Mr. Phillips signed it on my advice, and based on the fact that the letter from the Bulova people, the fact that Mr. Phillips told me he had not sold a watch to Mr. Goldstein, the conduct of Mr. Goldstein on both occasions when I was there with my wife, and all the facts, I would advise again the same way."

Stephen Spieler, referred to above, who was a manufacturing jeweler, testified that he purchased the watch in question from Phillips on consignment, sold it to Goldstein during the month of November, 1935, and gave it to Edward Code, one of his employees, for delivery to Goldstein. Code testified that he was employed by Spieler, who gave him a Bulova watch for delivery to Goldstein and that he delivered same in November, 1935.

Phillips admitted in his testimony that he did sell on consignment to Spieler on October 16, 1935, long after Goldstein had left his employment, the same watch which attorney Block purchased from plaintiff, but he insisted that Spieler returned same later.

There was a conflict in the evidence as to the circumstances under which plaintiff left defendants employment. Goldstein stated that after having discussed his future prospects and the matter of a salary increase with both Phillips and his wife and having been refused such an increase, he determined to quit and so advised Phillips; that he turned the key of the store over to him; and that sometime thereafter he turned over the key to the window bars on Phillips' store when the latter requested same. Phillips version was that Goldstein quit his job without notice and told him nothing about opening a store of his own.

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Stephen Spieler, referred to above, who was a manufacturing jeweler, testified that he purchased the watch in question from Phillips on consignment, sold it to Goldstein during the month of November, 1933, and gave it to Edward Dode, one of his employees, for delivery to Goldstein. Dode testified that he was employed by Spieler, who gave him a Bulova watch for delivery to Goldstein and that he delivered same in November, 1933.

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There was a conflict in the evidence as to the circumstances under which plaintiff left defendants employment. Goldstein stated that after having discussed his future prospects and the matter of a salary increase with both Phillips and his wife and having been refused such an increase, he determined to quit and so advised Phillips; that he turned the key of the store over to him; and that sometime thereafter he turned over the key to the window here on Phillips' store when the latter requested same. Phillips testified was that Goldstein quit his job without notice and told him nothing about opening a store of his own.

The law is settled that one who institutes a criminal prosecution against another may act upon the judgment of reputable counsel, and if he makes a full, fair and truthful statement of the facts within his knowledge and such counsel advises him that there is probable cause for criminal prosecution, such advice constitutes a complete and absolute defense. (Wicker v. Hotchkiss, 62 Ill. 107; Anderson v. Friend, 71 Ill. 475; Glenn v. Lawrence, 280 Ill. 581.) Did Phillips make such a full, fair and honest statement to his attorney as to absolve the defendants from liability? If there was credible evidence presented to the jury from which it could be fairly inferred that he did not make such a disclosure to his counsel as the law requires, then it was clearly a question of fact for the jury to pass upon as to whether he did or not. It was for the jury to decide if Phillips truthfully advised his attorney as to whether Goldstein left his employment with defendants without notice and under suspicious circumstances or whether he gave notice that he was quitting and did quit his job because of the meager salary he was receiving and the lack of opportunity for advancement. It was also for the jury to determine whether Phillips truthfully informed his attorney as to the Bulova watch in question. It must be borne in mind that after Block purchased the watch from Goldstein and Phillips was advised by the Bulova Watch Company that the identical watch had been sold and shipped to defendants, Phillips told his attorney that "he had never sold it through the store," although thereafter he admitted and his records show that he had sold the watch on consignment to Spieler on October 16, 1935. There is evidence in the record that, even after Goldstein's arrest and before his trial, Phillips visited Spieler and was told by the latter that the watch upon which Phillips predicated his prosecution of Goldstein was the same watch that Spieler had purchased on consignment. These and other facts and circumstances in evidence furnished ample justification to the jury to

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find that Phillips did not make a full, fair and honest disclosure of the facts to his attorney.

It was, of course, incumbent upon plaintiff to prove absence of probable cause for the prosecution. In discussing the element of probable cause in Glenn v. Lawrence, supra, the court said at p. 587:

"'Probable cause' was defined in Harpham v. Whitney, supra, as such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or to entertain an honest and strong suspicion that the person arrested is guilty. Substantially the same definition was given in Ross & Co. v. Innis, 35 Ill. 487, and McDavid v. Blevins, 85 id. 238. It is a belief held in good faith by the prosecutor in the guilt of the accused, based upon circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person that the defendant in the prosecution was guilty of the particular offense charged. The proof of a want of probable cause must necessarily be of a negative character, and slight evidence, such as, in the absence of proof by the defendant to the contrary, would afford ground for an inference that there was a want of probable cause, is usually sufficient. (Brown v. Smith, 83 Ill. 291.)"

We think that the evidence heretofore set forth and discussed not only presented a question of fact for the jury on the element of the absence of probable cause for plaintiff's prosecution, but that it warranted the jury in finding that such prosecution was instituted and carried on without probable cause. An important factor which has always been recognized in determining whether the prosecutor acted in good faith and with probable cause is the good character of the accused. It is conceded that Phillips entrusted Goldstein with his money and diamonds, as well as all the other jewelry in his store, while plaintiff worked there and that there was never a breath of suspicion concerning plaintiff's honesty and integrity during the ten years of his employment. The previous good character of a person suspected and knowledge of same by the accuser should act as a strong deterrent upon one about to make a criminal accusation. In discussing this question in Israel v. Brooks, 23 Ill. 526 [Orig. Ed. Page 575], the court said at pp. 528 and 529:

"The onus is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution - no such reasonable ground of suspicion suffi-

find that Phillips did not make a full, fair and honest disclosure of the facts to his attorney.

It was, of course, incumbent upon plaintiff to prove absence of probable cause for the prosecution. In discussing the element of probable cause in Brown v. Lawrence, supra, the court said at p. 587:

"'Probable cause' was defined in Kirkham v. Whitney, supra, as such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or to entertain an honest and strong suspicion that the person arrested is guilty. Substantially the same definition was given in Cox & Co. v. Lunin, 83 Ill. 487, and McDavid v. Sievins, 83 id. 532. It is a belief held in good faith by the prosecutor in the guilt of the accused, based upon circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person that the defendant in the prosecution was guilty of the particular offense charged. The proof of a want of probable cause must necessarily be of a negative character, and slight evidence, such as, in the absence of proof by the defendant to the contrary, would afford ground for an inference that there was a want of probable cause, is usually sufficient. (Brown v. Smith, 83 Ill. 501.)"

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"The onus is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution - no such reasonable ground of suspicion suffi-

ciently strong in itself, as to warrant a cautious man in believing that the person arrested is guilty of the offense with which he is charged. Jacks v. Stimpson, 13 Ill. 701; Richey v. McBean, 17 ib. 65; Hurd v. Shaw, 20 ib. 356.

"What these circumstances may be, cannot be specified, but we would think, among them, the good character of the party accused would stand out prominently. All must admit that is, and must be, a strong fact, if known to the accuser, to ward off suspicion, and therefore, for this purpose, it is entirely competent for the plaintiff in the action, in his opening proofs, to show that his character was good, and known to be so by the defendant, when he made the accusation. As the onus of proving a negative - the absence of probable cause - is thrown upon the plaintiff, slight evidence will usually suffice for such purpose. But the evidence of an uniform good character up to the time of the charge, is something more than slight evidence, and the plaintiff should have the benefit of it. If known to the prosecutor, what single fact is better calculated to weaken a belief, he being a prudent and cautious man, in the guilt of the suspected party."

It is the established rule that there must be a concurrence of malice and want of probable cause in order to maintain an action for malicious prosecution. That there was ample evidence to justify a finding by the jury that Phillips had no sufficient reason to believe Goldstein guilty has already been shown and malice may be inferred from the want of probable cause. However, the jury went further and found specially that the defendants were guilty of actual malice. In our opinion such finding was authorized by the facts and circumstances in evidence.

Defendants complain that the damages of $4,000 awarded plaintiff are excessive. When Goldstein and his brother opened their store, they each put $500 into the enterprise and were extended credit by several wholesale jewelry houses. Plaintiff testified that after his arrest and prosecution, even though he was found not guilty, the credit which he had theretofore established was withdrawn and he was required to pay cash for all merchandise purchased. Goldstein was not incarcerated. He paid $165 to attorneys to defend him against Phillips's prosecution and lost no more than a few days time from his business because of same. Having in mind that he necessarily suffered some damage to his reputation by reason of his arrest and prosecution

clearly strong in it self, so to warrant a cautious man in believing that the person arrested is guilty of the offense with which he is charged. Jacks v. Lithgow, 13 III. 701; Hickey v. Hagerty, 17 Ib. 65; Hurd v. Shaw, 20 Ib. 356.

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It is the established rule that there must be a concurrence of malice and want of probable cause in order to maintain an action for malicious prosecution. That there was ample evidence to justify a finding by the jury that Phillips had no sufficient reason to believe Goldstein guilty has already been shown and malice may be inferred from the want of probable cause. However, the jury went further and found specially that the defendants were guilty of actual malice. In our opinion such finding was authorized by the facts and circumstances in evidence.

Defendants complain that the damages of $4,000 awarded plaintiff are excessive. When Goldstein and his brother opened their store, they e ch put $500 into the enterprise and were extended credit by several wholesale jewelry houses. Plaintiff testified that after his arrest and prosecution, even though he was found not guilty, the credit which he had theretofore established was withdrawn and he was required to pay cash for all merchandise purchased. Goldstein was not incarcerated. He paid $165 to attorneys to defend him against Phillips's prosecution and lost no more than a few days time from his business because of same. Having in mind that he necessarily suffered some damage to his reputation by reason of his arrest and prosecution

and conceding that punitive or vindictive damages may be allowed in the case, the judgment, in our opinion, is much larger than the facts and circumstances would warrant. While it was said in Ross v. Innis, 35 Ill. 487, that "there is no standard by which damages in such cases shall be measured" and that "much is committed to the intelligence of the jury, much faith is reposed and must be, in their sense of right and justice," we think that the damages assessed were out of proportion, that an award of $2,000 damages would have been ample, and that the jury must have been actuated by passion and prejudice in awarding the amount it did. Therefore, if plaintiff consents to the entry of a remittitur in the sum of $2,000 within thirty days, the judgment will be affirmed; otherwise the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED UPON REMITTITUR OF $2,000; OTHERWISE JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Friend, P. J., and Scanlan, J., concur.

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AFFIRMED UPON REMITTITUR OF $2,000; OTHERWISE JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Friend, P. J., and Scanlan, J., concur.

39701

WILLIAM H. TERRELL,
Appellee,

v.

GEORGE H. WILSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

295 I.A. 615

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action brought December 13, 1935, by plaintiff, William H. Terrell, against George H. Wilson, for the alleged breach of an oral contract. A writ of attachment in aid of the main suit was issued and upon its return showing that defendant was not found and that no property of his was found, said writ of attachment was served together with interrogatories upon certain garnishees named in the complaint. December 24, 1935, and December 26, 1935, the garnishees answered that they had in their possession, respectively, $59.30 and $17.76 belonging to defendant. December 26, 1935, defendant filed his special appearance and December 27, 1935, his motion to quash the attachment, which motion was denied December 31, 1935. On the same day, after his motion to quash the attachment was denied, defendant by leave of court filed instanter his general appearance, an amended motion to quash the attachment and his "answer to the attachment in aid." Thereupon, also on the same day, the court found the issues against the defendant as to the attachment and entered judgment on such finding. January 15, 1936, defendant filed a written motion "to vacate the conditional judgment" entered December 31, 1935, which motion was denied on the same date. By leave of court an affidavit of merits and counterclaim were filed by defendant February 4, 1936. Both the issues as to the attachment and

39701

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the issues raised to the merits of plaintiff's claim were tried by the court without a jury. After numerous continuances an order was entered February 9, 1937, which after finding the issues on the merits against defendant and assessing plaintiff's damages at $162.30, rendered judgment upon such finding and also rendered judgments against the garnishees upon their answers for use of plaintiff. Defendant seeks by this appeal to reverse the judgment entered against him December 31, 1935, which found the issues against him as to the attachment, as well as the judgment order of February 9, 1937.

The pertinent portions of plaintiff's statement of claim are as follows:

"For services rendered by him in 1935, for the sum of $374.63 due plaintiff as commission for services rendered defendant by plaintiff, a real estate broker licensed by the State and City of Chicago, upon agreement of defendant to pay plaintiff commission of ten per cent of the amount saved the defendant in purchasing and paying off two real estate mortgages of $1,989.53 and $1,060 on the property of the defendant known by street number as 3809 South Wabash avenue in said city, which mortgages were paid off and released for $150 and $100 respectively, and for reduction of first mortgage on said property which was reduced in the sum of $846.80, making a total reduction of $3,746.33 and total commission of $374.63 upon which defendant paid the sum of $50 leaving a balance of $324.63, no part of which has been paid plaintiff, though many times demanded.

"There is due the plaintiff from the defendant after allowing the defendant all just c edits, deductions, and setoffs, $324.63.

"The defendant within two years last past fraudulently conveyed or assigned part of his effects so as to hinder and delay his creditors and is about fraudulently to convey, conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors."

Defendant's "answer to attachment in aid of garnishment" not only denied the specific grounds which plaintiff alleged in his complaint and upon which he based his right to proceed by way of attachment, but denied that he was guilty of conduct that brought him within any of the statutory grounds that would warrant the maintenance of an attachment proceeding against him. The record discloses that the order which found and adjudged the issues as to the

the issues raised to the merits of plaintiff's claim were tried by the court without a jury. After numerous continuances an order was entered February 9, 1937, finding the issues on the merits against defendant and assessing plaintiff's damages at $1,029.65, rendered judgment upon such finding; and also rendered judgments against the garnishees upon their answers for use of plaintiff. Defendant seeks by this appeal to reverse the judgment entered against him December 31, 1936, which found the issues against him as to the attachment, as well as the judgment order of February 9, 1937.

The pertinent portions of plaintiff's statement of claim are as follows:

"For services rendered by him in 1936, for the sum of $374.65 due plaintiff as commission for services rendered defendant by plaintiff, a real estate broker licensed by the State and City of Ohio, upon agreement of defendant to pay plaintiff commission of ten per cent of the amount saved the defendant in purchasing and paying off two real estate mortgages of $1,950.85 and $1,000 on the property of the defendant known by street number as 3806 South Indian avenue in said city, which mortgages were paid off and released for $900 and $500 respectively, and for reduction of first mortgage on said property which was reduced in the sum of $540.00, making a total reduction of $3,740.85 and total commission of $374.65 upon which defendant paid the sum of $50 leaving a balance of $324.65, no part of which has been paid plaintiff, though many times demanded.

"There is due the plaintiff from the defendant after allowing the defendant all just credits, deductions, and setoffs, $324.65.

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Defendant's "answer to attachment in aid of garnishment" not only denied the specific grounds which plaintiff alleged in his complaint and upon which he based his right to proceed by way of attachment, but denied that he was guilty of conduct that brought him within any of the statutory grounds that would warrant the maintenance of an attachment proceeding against him. The record discloses that the order which found and adjudged the issues as to the

attachment against the defendant included therein a recital that the court heard evidence and the arguments of counsel pertaining to such issue. There is no report of proceedings in the record as to what transpired on the hearing of said issues but defendant makes the assertion in his brief, which is not denied, that "it is admitted by all parties concerned that no evidence was ever taken and no one was sworn or testified in behalf of the plaintiff or defendant in this attachment proceeding." In his reply brief defendant reiterates that he was not permitted to present evidence in support of his answer on the issues as to the attachment. He says further that he was precluded from making any argument thereon and that the court entered the finding and judgment against him as to the attachment ostensibly because of the insufficiency of his answer. His answer questioning the propriety of the attachment was sufficient in all respects and defendant was entitled to a full, fair and complete hearing on the issues as to the attachment. The action of the trial court in denying defendant's right to such a hearing was clearly erroneous.

Numerous errors are assigned for the reversal of the judgment entered on the merits. After a careful examination of all the evidence contained in the report of proceedings and the rulings of the court as to the admission and exclusion of evidence, we are impelled to the conclusion that the ends of justice will be best served by a retrial of this cause on the merits, as well as on the issues as to the attachment. We feel that an extended discussion of the erroneous rulings of the court on the admission and exclusion of evidence would serve no good purpose since such rulings in most of the instances complained of were so obviously improper that they are not likely to recur when the case is tried again.

Plaintiff's motion, heretofore made and reserved to hearing, to strike the report of proceedings and the abstracts and to dis-

attachment against the defendant inclined thereto in a recital that the court heard evidence and the arguments of counsel pertaining to such issue. There is no report of proceedings in the record as to what transpired on the hearing of said issues and defendant makes the assertion in his brief, which is not denied, that it is admitted by all parties concerned that no evidence was ever taken and no one was sworn or testified in behalf of the plaintiff or defendant in this attachment proceeding." In his reply brief defendant reiterates that he was not permitted to present evidence in support of his answer on the issues as to the attachment. He says further that he was precluded from making any argument thereon and that the court entered the finding and judgment against him as to the attachment notwithstanding the insufficiency of his answer. His answer questioning the propriety of the attachment was sufficient in all respects and defendant was entitled to a full, fair and complete hearing on the issues as to the attachment. The action of the trial court in denying defendant's right to such a hearing was clearly erroneous.

Numerous errors are assigned for the reversal of the judgment entered on the merits. After a careful examination of all the evidence contained in the report of proceedings and the rulings of the court as to the admission and exclusion of evidence, we are impelled to the conclusion that the ends of justice will be best served by a retrial of this cause on the merits, as well as on the issues as to the attachment. We feel that an extended discussion of the erroneous rulings of the court on the admission and exclusion of evidence would serve no good purpose since such rulings in most of the instances complained of were so obviously improper that they are not likely to recur when the cause is tried again.

Plaintiff's motion, heretofore made and reserved to hearing, to strike the report of proceedings and the abstracts and to dis-

miss this appeal is denied.

The judgment of the Municipal court entered against defendant December 31, 1935, on the issues as to the attachment and the judgment entered against defendant on the merits, February 9, 1937, are reversed and the cause is remanded for a new trial on both the issues raised as to plaintiff's right to relief by way of attachment and as to the merits of his claim.

JUDGMENTS REVERSED AND CAUSE REMANDED.

Friend, P. J., and Scanlan, J., concur.

mies this appeal is denied.

The judgment of the Municipal court entered against defendant December 31, 1928, on the issues as to the attachment and the judgment entered against defendant on the merits, February 9, 1927, are reversed and the cause is remanded for a new trial on both the issues raised as to plaintiff's right to relief by way of attachment and as to the merits of his claim.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Scanlan, J., concur.

39359

MARIA LASKOWSKI, also known as MARIA BALABAN,

Plaintiff - Appellant,

v.

ERWIN E. COWEN,

Defendant - Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

295 I.A. 615

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in the Municipal Court of Chicago upon a directed verdict.

Plaintiff instituted suit by filing an action in the Municipal Court of Chicago against the defendant to recover the sum of $815, which the plaintiff claims was converted by the defendant to his own use. From the statement of claim it appears that prior to January 31, 1928, the defendant appeared as attorney for the plaintiff in certain divorce actions, and that in the adjustment of the property rights as between the plaintiff and her husband, the defendant acted as attorney, and these property rights were adjusted and the defendant received $740, the amount agreed upon between the parties. In addition to this amount the defendant received a fee of $75.00 from the plaintiff's husband, which he did not divulge to the plaintiff and which rightfully belongs to the plaintiff.

The defendant's affidavit of merits to this claim is that he admits he appeared as the attorney for plaintiff in certain divorce actions, and also admits that he received $740 in cash from the plaintiff's husband in adjustment of the property interests, and also received $75.00 as fees from the plaintiff's husband in the divorce action, but denies that he fraudulently converted the sum of $740, or the sum of $75.00.

The defendant further sets up in his affidavit of merits that the plaintiff and the defendant agreed upon the sum of $825. as being a reasonable sum to be paid to the defendant for legal services

MARIA LAMBROPOULI, also known as
MARIA STAMOS,

Plaintiff - Appellee,

v.

MARIN S. STAMOS,

Defendant - Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Mr. PRESIDING JUSTICE SCHWI delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment entered in the municipal court of Chicago upon a directed verdict.

Plaintiff instituted suit by filing an action in the municipal court of Chicago against the defendant to recover the sum of $[illegible], which the plaintiff claims was converted by the defendant to his own use. From the statement of claim it appears that prior to January 21, 1938, the defendant appeared as attorney for the plaintiff in certain divorce actions, and that in the adjustment of the property rights as between the plaintiff and her husband, the defendant acted as attorney, and these property rights were adjusted and the defendant received $740, the amount agreed upon between the parties. In addition to this amount the defendant received a fee of $75.00 from the plaintiff's husband, which he did not divulge to the plaintiff and which rightfully belongs to the plaintiff.

The defendant's affidavit of merits to this claim is that he admits he appeared as the attorney for plaintiff in certain divorce actions, and also admits that he received $740 in cash from the plaintiff's husband in adjustment of the property interests, and also received $75.00 as fees from the plaintiff's husband in the divorce action, but denies that he fraudulently converted the sum of $740, or the sum of $75.00.

The defendant further made up in his affidavit of merits that the plaintiff and the defendant agreed upon the sum of $[illegible], as being a reasonable sum to be paid to the defendant for legal services

rendered in the two divorce actions; and further sets up as a defense that prior to the institution of the plaintiff's suit, plaintiff filed in the United States District Court for the Northern District of Illinois, a petition in bankruptcy, and from the record of such proceedings it appears that the plaintiff had heretofore assigned all her alleged right, title and interest in and to the alleged claim, which is the subject matter of this suit, to the Casimir Pulaski Building & Loan Association.

Upon motion of the defendant at the close of plaintiff's case and while the defendant was testifying, the court interrupted by instructing the jury to find the issues for the defendant, and upon the return of the verdict, judgment was entered for the defendant. It is from this judgment that the plaintiff is now in this court on appeal.

The plaintiff appeared in this court by L. A. Sherwin, an attorney practicing at the Chicago Bar, and upon consideration of the brief filed, this court ordered that the brief be stricken for a failure to comply with Rule 7 of the Court, which provides for the preparation of briefs, and subsequently refused to permit an amended brief to be filed by the attorney on behalf of his client. However, we have examined the record, and, as stated, the action is between the plaintiff and her attorney as the defendant, who appeared for her in two divorce actions. It also appears from the record that this attorney admits he received this money, and as the attorney for the plaintiff he should properly account for the sum he had in his possession.

There are two defenses in this case. The only facts heard by the court were on the question of whether or not the plaintiff had assigned her claim to the Casimir Pulaski Building and Loan Association. This was an issue presented by the defendant, in which he stated that it appears from the record in a bankruptcy proceeding in which the plaintiff was involved that she had assigned this claim against him to

rendered in the two divorce actions; and further sets up as a defense that prior to the institution of the plaintiff's suit, plaintiff filed in the United States District Court for the Northern District of Illinois, a petition in bankruptcy, and from the record of such proceedings it appears that the plaintiff had heretofore assigned all her alleged right, title and interest in and to the alleged claim which is the subject matter of this suit, to the Chicago Title and Trust Company.

Upon motion of the defendant at the close of plaintiff's case and while the defendant was testifying, the court instructed by instructing the jury to find the issues for the defendant, and upon the return of the verdict, judgment was entered for the defendant. It is from this judgment that the plaintiff is now in this court on appeal.

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There are two defenses in this case. The only facts heard by the court were on the question of whether or not the plaintiff had assigned her claim to the Chicago Title Building and Loan Association. This was an issue presented by the defendant, in which he stated that it appears from the record in a bankruptcy proceeding in which the plaintiff was involved that she had assigned this claim against his to

the Casimir Pulaski Building and Loan Association. That was the issue presented to the court, and the record in the bankruptcy proceeding was competent evidence to show whether such an assignment was made to the Casimir Pulaski Building and Loan Association.

An order was entered by the Referre in Bankruptcy who passed upon the question of whether an assignment was so made, and it appears from this order that the Referee found there had never been an assignment by the debtor of her claim against Erwin E. Cowen to the Casimir Pulaski Building and Loan Association, or to anyone else, and that the debtor was and is the owner of said claim.

It further appears from this order that Casimir Pulaski Building and Loan Association, present in open court by its officers, disclaims ever having received any assignment, written or oral, from the debtor of any indebtedness due to the debtor from Erwin E. Cowen, or of having any knowledge of any such assignment.

In view of the issue presented to the court by the defendant's affidavit of merits it should have permitted the plaintiff to introduce in evidence the certified copy of the order of the Referee in Bankruptcy entered in the proceeding in which the plaintiff was the petitioner in bankruptcy.

The other defense interposed by the defendant in his affidavit of merits was that the amount he had in his possession was adjusted by the agreement of the parties that it should be applied in payment of his services as attorney for the plaintiff. This, however, was not presented upon the trial of the case, and we presume that all the matters between the parties will be presented to and heard by the court, and that a proper judgment will be entered.

For the reasons stated the judgment is reversed and the cause is remanded for another trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

the Gaelic Talmidi Building and Loan Association. That was the legal argument. The court, and the result in the District Court, was such as to show either that no such legal argument was made in the Gaelic Talmidi Building and Loan Association.

In order can answer by the jurors in charging the jury passed upon the question of whether the instrument was a note, and it appears from this order that the jurors found that it had been an instrument by the debtor of her debts against trial. Down to the Gaelic Talmidi Building and Loan Association, or to anyone else, and that the debtor was not in the power of said debts.

It further appears from this order that Gaelic Talmidi Building and Loan Association, through its open court by its officers, directors and other having received any instrument, written or oral, from the debtor of any indebtedness due it the debtor from Irish Crown, or of having any knowledge of, by such instrument.

In view of the issue presented to the court by the pleadings and affidavit of merits it should have permitted the defendant to introduce in evidence the entire copy of the note or the Gaelic or Phonography entered in the proceeding in which the plaintiff was the petitioner in shorthand.

The court dismiss instrument by the defendant in his affidavit of merits was that the amount he had in the Gaelic Association was adjusted by the agreement of the parties that it was to be in lieu of payment of his services as attorney for the plaintiff. This, however, was not presented upon the trial of the case, but he presumes that all the matters between the parties will be determined in the hearing by the court, and that a proper judgment will be entered.

For the reasons stated the judgment in question and the order in question are reversed.

CHARLES S. COLLINS AND BOND, JJ., concur.

BRENNAN and DONAHUE.

39718

MARY FLANAGAN, et al.,

(Plaintiffs) Appellants,

v.

MADISON SQUARE STATE BANK, a banking corporation, et al.,

Defendants below,

CARL F. KUEHNLE, JR.,

(Defendant) Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

295 I.A. 616

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs from an order entered by the court reducing the amount of the judgment entered against Carl F. Kuehnle, Jr., one of the defendants in the proceeding. This appeal has been consolidated for hearing with the appeals in cases numbered 39720 and 39721.

The facts in this case are that the suit instituted by the plaintiffs was on behalf of themselves and all other creditors of the Madison Square State Bank, to enforce the liability of the stockholders of the bank to its creditors, and Logan L. Mullins is the duly appointed, qualified and acting receiver.

Thereafter on January 22, 1937, a decree was entered in this cause, which found among other things, that Carl F. Kuehnle, Jr., held 10 shares of capital stock in the Madison Square State Bank from September 17, 1930, to June 14, 1932, the date of the closing of the bank, having a par value of $1,000, that the unsatisfied liabilities accruing during his share holdings amounted to $678,999.04, and decreasing his liability at $1,000, plus $40. costs and that he pay the same to the receiver.

On June 2, 1937, a petition was filed by Carl F. Kuehnle, Jr., setting forth that he was one of the defendants in this cause; that he was the holder of record of 10 shares of the capital stock

MARY WYANDANT, et al.,

(Liquidator) Appellants,

v.

MADISON SQUARE STATE BANK, a banking corporation, et al.,

Defendants below,

DANIEL F. RUTHERFORD, JR.,

(Defendant) Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MORRIS COUNTY.

2951.A.610

BEFORE JUSTICES SCHALICK AND HEHER.

This is an appeal by the liquidator from an order dismissing by the court rendering the judgment of the judgment against defendant Daniel F. Rutherford, Jr., one of the defendants in the proceeding. This appeal has been consolidated for hearing with the appeals in cases numbered 30720 and 30721.

The facts in this case are that the suit instituted by the liquidator was on behalf of themselves and all other creditors of the Madison Square State Bank, to enforce the liability of the stockholders of the bank to its creditors, and claim a. Rutherford is the only stockholder, qualified and acting receiver.

Thereafter on January 27, 1927, a decree was entered in this cause, which found among other things, that Daniel F. Rutherford, Jr., held 10 shares of capital stock in the national Madison State Bank from September 17, 1920, to June 14, 1926, the date of the closing of the bank, having a par value of $1,000, that the aggregate that liabilities accruing during the share holdings amount of to $278,390.04, and accruing his liability at $1,000, plus 20% costs and that be pay the same to the receiver.

On June 5, 1927, a petition was filed by Daniel F. Rutherford, Jr., setting forth that he was one of the defendants in this cause; that he was the holder of record of 10 shares of the capital stock

of the Madison Square State Bank, of the par value of $100 per share, and that a decree was entered against him on January 22, 1937, for $1,000 and his proportionate share of costs amounting to $40. Since the recovery of the judgment, the defendant had paid to Logan L. Mullins, receiver, on account of his liability the sum of $150 in installments on March 25, 1937, and April 25, 1937. The defendant offered to pay in full payment and satisfaction and discharge of the sum of $850.00 due on the aforesaid judgment, $650.00 in cash, and it was to the best interest of all parties concerned that the offer be accepted.

The defendant then prayed for the entry of an order authorizing and directing Logan L. Mullins, receiver, to accept from the defendant the further sum of $650.00 in cash in full payment and satisfaction of the balance due from the petitioner under and by virtue of the judgment entered against the petitioner.

An order was entered on June 2, 1937, upon the petition filed by Carl F. Kuehnle, Jr. wherein the court directed that Logan L. Mullins, Receiver, is authorized to accept from Carl F. Kuehnle, Jr. the sum of $700.00, to be paid within one week from the date of the entry of the order in full payment, satisfaction and discharge of the balance due from Carl F. Kuehnle, Jr., pursuant to the judgment heretofore entered against him on January 22, 1937, for $1,000.

The theory of the plaintiff in this case is that Section 11 of the Banking Act gives the right to the receiver to compromise the liability of insolvent stockholders, and that this compromise of liability of insolvent stockholders does not affect any of the three defendants, for the reason that the petitions do not set forth insolvency or that there was a compromise of liability by these three defendants with the creditors. No answers were filed and no evidence was heard by the court. The creditors are prosecuting their own suit

of the Madison County State Bank, of the par value of $[illegible] per share, and that a decree pro confesso against Julius Ulm on January 7, 1877, for $1,000 and his proportionate share of costs amounting to $[illegible]. Since the recovery of the judgment, the defendant had paid to Judge L. Mulling, receiver, on account of his liability the sum of $[illegible] on installments on dates [illegible], 1877, and April 22, 1877. The defendant offered to pay in full payment and satisfaction the balance of the sum of $[illegible] due on the aforesaid judgment, interest to date, and it was to the best interest of all parties concerned that the offer be accepted.

The defendant then prayed for the entry of an order authorizing and directing Judge L. Mulling, receiver, to accept from the defendant the further sum of $[illegible] in full payment and satisfaction of the balance due from the petitioner under and by virtue of the judgment entered against the petitioner.

An order was entered on June 2, 1877, upon the petition filed by Carl F. Kuehnle, Jr., wherein the court directed that Judge L. Mulling, receiver, is authorized to accept from Carl F. Kuehnle, Jr., the sum of $[illegible], to be paid within one week from the date of the entry of the order in full payment, satisfaction and discharge of the judgment due from Carl F. Kuehnle, Jr., returned to the judgment bertofore entered against him on January 6, 1877, for $1,000.

The theory of the plaintiff in this case is that section 12 of the banking act gives the right to the receiver to compromise the liability of insolvent stockholders, and that this compromise of liability of insolvent stockholders does not affect any of the three defendants, for the reason that the petitions do not set forth insolvency or that there was a compromise of liability by these three defendants with the creditors. No answers were filed and no evidence was heard by the court. The creditors are prosecuting their own suit

and are entitled to conduct the matter in their own way, and are entitled to collect in full from the defendants. Therefore, the defendants were without authority of law to file a petition seeking to settle the liability of stockholders for a less amount than that found in the decree entered against them.

From the facts in the instant case this court is controlled by the opinion of the Supreme Court in the case of Burket v. Reliance Bank and Trust Co., 367 Ill. 196, wherein the court said:

> "Section 11 of the Banking act, (State Bar Stat. 1935, chap. 18a, p. 161), in so far as is material here, provides that any creditor or creditors of the bank may, by bill in equity in the nature of a creditor's bill, brought in behalf of himself and all other creditors of the bank, against the stockholders of the bank, have determined the liability of such stockholders under section 6 of article 11 of the constitution. That section provides: 'Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.' Section 11 of the Banking act also provides for the appointment of a receiver for the collection of the amounts due from the stockholders. The following provision of that section is the one complained of here: 'Said receiver shall have authority upon the order of the court appointing him to employ such auditors and assistants as may be necessary to establish and recover the liabilities of the stockholders, and may, with the approval of the court, enter into compositions with insolvent stockholders, if any.'
>
> * * * A receiver appointed by the court in such a case is but an officer of that court for collecting, receiving and disbursing amounts due from stockholders. He is not a party to the litigation brought by the creditors of the bank and has no control over that litigation. He is, in fact, a stranger to it. The suit to establish the liability of the individual stockholder is a suit of the creditors and theirs alone, and they have a right to pursue their own remedies in regard to their own individual property. After the liability of each individual stockholder is established by a decree entered in the suit, the money which is collected belongs to the creditors. (Golden v. Cervenka, 278 Ill. 409). The stockholders' liability is not one to the bank but to the creditors and the creditors, either alone or by representative suit, are the only ones who can enforce the liability by such remedies as the law affords. (Golden v. Cervenka, supra: Wincock v. Turpin, 96 Ill. 135; Runner v. Dwiggins, 147 Ind. 238, 46 N. E. 580; Colton v. Mayer, 90 Md. 711). Regardless of whether the clause here under consideration grants to the receiver and courts power to control the property rights of the individual creditors which transcends constitutional limitations, it is evident that any proceeding by which approval of an official act is sought, contemplates notice to the parties in interest, a hearing

and are entitled to conduct the matter in their own way, and are entitled to collect in full from the defendants. Therefore, the defendants were without authority of law to file a petition seeking to settle the liability of stockholders for a less amount than that found in the decree entered against them.

From the facts in the instant case this court is controlled by the opinion of the Supreme Court in the case of Burke v. Reliance Trust and Trust Co., 207 Ill. 198, wherein the court said:

"Section 11 of the banking act, (Hurd's Rev. Stat. 1908, chap. 18, par. 183), in so far as is material here, provides that any creditor or creditors of the bank may, by bill in equity in the nature of a creditor's bill, brought in behalf of himself and all other creditors of the bank, against the stockholders of the bank, have determined the liability of such stockholders under section 6 of article 11 of the constitution. That section provides: 'Every stockholder in a banking corporation or association shall be individually responsible and liable to the creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.' Section 11 of the banking act also provides for the appointment of a receiver for the liquidation of the bank's affairs from the stockholders. The following provision of that section is the one complained of here: 'Said receiver shall have authority upon the order of the court appointing him to employ such auditors and assistants as may be necessary in settling the affairs and liabilities of the stockholders, and may, with the approval of the court, enter into compositions with insolvent stockholders, if any.'

"If a receiver appointed by the court in such a case is not an officer of that court for collecting, receiving and distributing assets due from stockholders, it is not a party to the litigation brought by the creditors of the bank and has no control over that litigation. He is, in fact, a stranger to it. The suit to establish the liability of the individual stockholder is a suit of the creditors and hence they alone, and they have a right to pursue their own remedies in regard to their own individual property. After the liability of each individual stockholder is established by a decree entered in the suit, the money which is collected belongs to the creditors. (Gaines v. Ferguson, 179 Ill. 408). The stockholders' liability is not one to be worked out by the creditors and the receiver, either alone or by representatives suit, but the only ones who can enforce the liability by such remedies as the law affords. (Gaines v. Ferguson, supra; Hanson v. Jordan, 98 Ill. 148; Burke v. Reliance, 147 Ill. 198, 32 N. E. 240; Dalton v. Bryan, 80 Ill. 71). Proceedings of whether the claims have been paid constitutes a power in the receiver and courts power to control the property rights of the individual creditors which transcends constitutional limitations. It is evident that any proceeding by which recovery of a difficult nature is sought, necessarily relates to the merits in interest, a matter

of evidence and determination of the essential facts upon which the exercise of the power rests. These are essential to due process of law. Here nothing of that sort was done. In the Rappeport matter the petition contained no allegation that the petitioner was insolvent. No attempt was made to determine that question and no hearing was had."

When notice of appeal and praecipe were filed, it was requested that a report of the proceedings be filed with the record, but such report is not incorporated in the several records.

As we have indicated in the opinion, no answers were filed to the several petitions, nor evidence heard by the court, and the authority of the receiver to act does not appear from anything that has been called to our attention in the briefs. As the Supreme Court has stated in its opinion, the receiver is an officer of the court, and it is not proper for the receiver to file a petition, as was done in two of the cases, for the reason that he is a stranger to the proceedings and is not permitted to file a petition for the purpose of compromising the amount entered in the judgment. Suit to establish the liability of the individual stockholder is a suit of the creditors, and the creditors alone. Therefore, the receiver being a stranger to the proceeding he is not interested to the extent that he may file a petition to compromise the liabilities of the several stockholders. There is no finding in the order that evidence was heard or that each of the petitioners was insolvent, which is necessary.

For the reasons stated we are of the opinion that the court erred in entering the several orders, and they are reversed.

ORDERS REVERSED.

HALL, J. CONCURS,
DENIS E. SULLIVAN, J. TAKES NO PART.

of evidence and determination of the essential facts upon which the exercise of the power rests. These are essential to the process of law. Here nothing of that sort was done. It is impossible within the meaning of the Constitution that the petitioner and involuntary. No effort was made to determine that question the so nothing was had."

Upon notice of appeal and transcript were filed, it was requested that a report of the proceedings be filed with the court, but such report is not incorporated in the several records.

As we have indicated in the opinion, no papers were filed in the several petitions, nor evidence heard by the court, and the authority of the receiver to act does not appear from anything that has been filed in our jurisdiction in the trial. In the Supreme Court has stated in its opinion, the receiver is an officer of the court, and it is not proper for the receiver to file a petition, as was done in one of the cases, for the reason that he is a minister to the proceedings and is not permitted to file a petition for the purpose of concentrating the assets intended to the judgment. Will to establish the liability of the individual stockholder is a suit of the creditors, and the creditors alone. Therefore, the receiver being a stranger to the proceeding he is not interested in the extent that he may file a petition to determine the liabilities of the several stockholders. There is no finding in the order that evidence was heard or that each of the petitioners was involved, which is necessary.

For the reasons stated we are of the opinion that the court erred in entering the several orders, and they are reversed.

(Order accordingly.)

MILL, J. MEDDER.
DENIS P. MORIARTY, C. JUSTICE DO-FAST.

38720

MARY FLANAGAN, et al., (Plaintiffs) Appellants, v. MADISON SQUARE STATE BANK, a banking corporation, et al., Defendants below, LOUIS STEINBRECHER, (Defendant) Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

295 I.A. 616

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs from an order entered by the court reducing the amount of the judgment against Louis Steinbrecher, one of the defendants in the proceeding, and in this case the facts are that suit was instituted by the plaintiffs on behalf of themselves and all other creditors of the Madison Square State Bank, to enforce the liability of the stockholders of the bank as its creditors, and that Logan L. Mullins is the duly appointed, qualified and acting receiver.

Thereafter on January 28, 1937, a decree was entered, which found among other things that Louis Steinbrecher, held 10 shares of the capital stock in the Madison Square State Bank, as follows: Seven shares from November 3, 1923, to September 16, 1930, of the par value of $700, and three shares from November 3, 1923, to June 14, 1932, the date of the closing of the bank, of the par value of $300, and the unsatisfied liabilities accruing during his share holdings amounted to $134,909.98, from November 3, 1923, to September 16, 1930, and $854.281.45, from November 3, 1923, to June 14, 1932, and decreeing his liability at $1,000 plus $40 costs and that he pay the same to the receiver.

On June 7, 1937, a petition was filed in court by Logan L. Mullins, Receiver, to compromise the liability of Louis Steinbrecher, defendant, setting forth that this is a suit brought by the plaintiffs

on behalf of themselves and all other creditors of the Madison Square State Bank, to enforce the liability of the stockholders of the bank to its creditors and that Logan L. Mullins is the duly appointed, qualified and acting receiver herein.

On January 22, 1937, a decree was entered against Louis Steinbrecher for $1,000 plus his proportionate share of the costs amounting to $40 by reason of his stockholdings in the Madison Square State Bank.

The defendant has offered to pay to the petitioner the sum of $850 in cash, in full settlement and satisfaction of his liability, and of the decree which was entered against him as aforesaid, and Logan L. Mullins recommends that the offer be accepted. The prayer asks for an order authorizing and directing Logan L. Mullins to accept the sum of $850 in cash in full settlement and satisfaction of the liability of Louis Steinbrecher of the Madison Square State Bank, and in full settlement and satisfaction of the decree heretofore entered against Louis Steinbrecher in the above entitled cause, which petition was signed and verified on behalf of Logan L. Mullins, as receiver, by Walter P. Murphy, his attorney and duly authorized agent.

The court entered a decretal order that Logan L. Mullins, receiver, be and he is authorized and directed to accept the sum of $850 in cash in full settlement and satisfaction of the decree and judgment for $1,000 plus costs entered against Louis Steinbrecher.

The instant case was consolidated with case No. 39718, and the opinion of the court in that case is controlling in this case.

For the reasons stated in the opinion the order is reversed.

ORDER REVERSED.

HALL, J. CONCURS
DENIS E. SULLIVAN, J. TAKES NO PART.

39721

MARY FLANAGAN, et al., (Plaintiffs) Appellants, v. MADISON SQUARE STATE BANK, a banking corporation, et al., Defendants below, JOHN T. KERWIN, (Defendant) Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

295 I.A. 616[3]

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs from an order entered by the court reducing the amount of the judgment against John T. Kerwin, one of the defendants in the proceeding. The facts in this case are that an order was entered on June 7, 1937, that plaintiffs' suit is a representative one brought in behalf of themselves and all other creditors of the Madison Square State Bank to enforce the liability of the stockholders of the bank to its creditors, and that Logan L. Mullins is the duly appointed, qualified and acting receiver.

On January 22, 1937, a decree was entered, which found among other things that John T. Kerwin was the holder of 10 shares of the capital stock in the Madison Square State Bank, of the par value of $1,000, from January 21, 1931, to June 14, 1932, the date of the closing of the bank, and that the unsatisfied liabilities accruing during his shareholdings amounted to $633,809.96, and decreeing his liability at $1,000, plus $40 costs.

A petition was filed in the court on June 7, 1937, by Logan L. Mullins, receiver, which sets forth that on January 22, 1937, the decree above mentioned was entered against John T. Kerwin, defendant, for $1,000, plus costs of $40, by reason of his stockholdings in the Madison Square State Bank. The defendant has offered

[illegible]

MARY [illegible], et al.,

(Plaintiffs) Appellants,

v.

[illegible] STATE BANK, a banking corporation, et al.,

Defendants below,

JOHN T. [illegible],

(Defendant) Appellee.

[illegible]

[illegible]

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

This is an appeal by the plaintiffs from an order entered by the court reducing the amount of the judgment against John T. Ferris, one of the defendants in the proceeding. The facts in this case are that an order was entered on June 7, 1927, that plaintiffs' suit is a representative one brought in behalf of themselves and all other creditors of the Indian Springs State Bank to enjoyn the liability of the stockholders of the bank to its creditors, and that Logan L. Mullins is the duly appointed, qualified and acting receiver.

On January 20, 1927, a decree was entered, which found among other things that John T. Ferris was the holder of 20 shares of the capital stock in the Indian Springs State Bank, of the par value of $1,000, from January 21, 1923, to June 16, 1927, the date of the closing of the bank, and that the constructive liabilities accruing during his shareholding amounted to $22,[illegible].06, and decreeing his liability at $1,000, plus 840 costs.

A petition was filed in the court on June 7, 1927, by Logan L. Mullins, receiver, which sets forth that on January 20, 1927, the decree above mentioned was entered against John T. Ferris, defendant, for $1,000, plus costs of $40, by reason of his stockholding in the Indian Springs State Bank. The defendant has filed

to pay $850 in cash in full settlement and satisfaction of his liability and of the decree which was entered against him, and Logan L. Mullins, receiver, recommended that the offer be accepted. Thereupon the court entered an order decreeing that Logan L. Mullins, receiver herein, be and he is authorized and directed to accept $850 in cash in full settlement and satisfaction of the decree and judgment amounting to $1,000.

The instant case was consolidated with case No. 39718, and the opinion of the court in that case is controlling in this case.

For the reasons stated in the opinion the order is reversed.

ORDER REVERSED.

HALL, J. CONCURS
DENIS E. SULLIVAN, J. TAKES NO PART.

to pay $850 in cash in full settlement and satisfaction of his liability and of the decree which was entered against him, and Logan L. Collins, receiver, recommended that the offer be accepted. Thereupon the court entered an order directing that Logan L. Collins, receiver herein, be and he is authorized and directed to accept $850 in cash in full settlement and satisfaction of the decree and judgment amounting to $1,000.

The instant case was consolidated with case no. 28928, and the opinion of the court in that case is controlling in this case.

For the reasons stated in the opinion the order is reversed.

ORDER REVERSED.

HAIN, J. CONCURS
DOBIE, C. SUPPLIES, J. TAKES NO PART.

39747

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. OSCAR NELSON, Auditor of
Public Accounts,

v.

CHICAGO LAWN STATE BANK, a corporation,

CHARLES H. ALBERS, Receiver of Chicago
Lawn State Bank, a corporation,

(Petitioner) Appellee,

v.

STIEFEL FURNITURE COMPANY, a corporation, Claimant under Claim No. 4208,

(Respondent) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

295 I.A. 616[4]

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondent from an order entered by the court sustaining the petitioner's exceptions to the Master's Report, denying the respondent's claim for preference in the sum of $2300, and taxing costs against the respondent.

In the proceedings for the liquidation of the Chicago Lawn State Bank, William L. O'Connell, the predecessor receiver of Charles H. Albers, Receiver, filed a petition on June 24, 1936, which alleges: first, the appointment of a receiver; second, that the receiver published for claims and that numerous claims were filed, third, that a claim for preference was filed by the respondent for $2,376.96, founded upon a certain checking account and certified check, and the petitioner believes such claim is not entitled to preference, upon the ground that the relationship between the bank and the claimant was that of debtor and creditor.

On July 11, 1936, the court granted leave to claimant to amend its claim instanter on its face by reducing its general claim to $331.25 and increasing its claim for preference by $150.58 for

MR. PRESIDING JUSTICE WEBER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondent from an order entered by the court sustaining the petitioner's exceptions to the Master's Report, denying the respondent's claim for preference in the sum of $8500, and taking costs against the respondent.

In the proceedings for the liquidation of the Citizens Loan State Bank, William L. O'Donnell, the predecessor receiver of Charles E. Albers, receiver, filed a petition on June 24, 1932, which alleges: First, the appointment of a receiver; second, that the receiver published for claims and that numerous claims were filed, third, that a claim for preference was filed by the respondent for $2,372.08, founded upon a certain checking account and certified check, and the petitioner believes such claim is not entitled to preference, upon the ground that the relationship between the bank and the claimant was that of debtor and creditor.

On July 11, 1932, the court granted leave to claimant to amend its claim instead on its face by reducing its general claim to $321.35 and increasing its claim for preference by $180.13 for

cash deposited on June 9, 1931, and granted leave to claimant to answer the receiver's petition, and referred the petition and answer to a master in chancery to report his conclusions of law and fact to the court.

Later an order was entered giving leave to the claimant to amend the claim it had theretofore filed against the bank on the face of the claim, to answer the petition, and referring the petition and answer to a master in chancery.

The claim of Stiefel Furniture Company, on its face, sought a general claim for $331.25 and a preferred claim for $2,537.54. The preferred claim, as amended, was based upon three separate items:

1. Checks totalling the sum of $176.96, the proceeds of which were received by the receiver of the bank after its close; as to this portion of the claim, it was stipulated between the parties that the claimant was entitled to a preferred claim in that amount and it was so ordered.

2. Cash deposits made by the claimant within thirty minutes before the closing of the bank, in the sum of $150.58; as to this portion of the preferred claim the master in chancery and the court held that a preference should be denied and the appellant has not and is not appealing from the ruling as to that item.

3. A check for $2200 drawn by the claimant on the day preceding the bank's closing, upon which the bank placed a purported certification, which check was indorsed and delivered to the State Street Furniture Co. and was not paid, due to the bank's closing, and on which check the Stiefel Furniture Co. sought a preference as assignee of the State Street Furniture Co.

Hearings were had before the master in chancery. At the conclusion of the hearing the master filed his report, recommending that the respondent be allowed a preferred claim upon the check for

ceed dismissed on June 9, 1921, and granted leave to claimant to amend the pleaders's petition, and referred the petition and answer to a master in chancery to report his conclusions of law and fact to the court.

Later an order was entered giving leave to the claimant to amend the claim it had therefore filed against the work on the fund of the claim, to answer the petition, and referring the petition and answer to a master in chancery.

The claim of Ideal Furniture Company, on its face, sought a general claim for $[illegible] and a preferred claim for $[illegible]. The preferred claim, as amended, was based upon three separate items:

1. Checks totalling the sum of $[illegible], the proceeds of which were received by the receiver of the book after the closed, as to this portion of the claim, it was stipulated between the parties that the claimant was entitled to a preferred claim in that amount and it was so ordered.

2. Cash deposits made by the claimant within forty minutes before the closing of the work, in the sum of $[illegible]; as to this portion of the preferred claim the master in chancery and the court held that a preference should be denied and the appellant has not and is not appealing from the ruling as to that item.

3. A check for $[illegible] drawn by the claimant on the day preceding the bank's closing, upon which the bank issued a uncertified certification, which check was returned and delivered to the State Street Furniture Co. and was not paid, but to the bank's closing, and on which check the Ideal Furniture Co. sought a preference as assignee of the State Street Furniture Co.

Pleadings were had before the master in chancery. In the conclusion of the hearing the master filed his report, recommending that the claimant be allowed a preferred claim upon the check for

$2200, and the checks upon which the receiver had received the proceeds, in the sum of $170.76, and had stipulated should be preferred, and further recommending that the claim for preference, in the sum of $150.58 be denied and allowed as a general claim only.

To this report the petitioner filed objections, which were overruled and by order permitted to stand as exceptions. The exceptions were directed to that part of the report which allowed the preferred claim for $2,200.

Upon a hearing by the court, an order was entered sustaining the exceptions of the petitioning receiver, and denying to the respondent a preferred claim of $2,200, and limiting the respondent's preferred claim to the stipulated sum of $170.76, and that costs be taxed against the respondent for $250.00 and $50.00 for the cost of the proceedings, and also $87.00 of such costs against the petitioning receiver. It is from the entry of that order that this appeal is taken, the appeal being limited to that part of the order which denies a claim for preference upon the $2,200 check.

From the facts as set forth in the record, the Chicago Lawn State Bank closed and the Auditor of Public Accounts of the State of Illinois took possession of its assets on June 9, 1931. For a considerable period of time prior thereto the Stiefel Furniture Co. had been a depositor of that bank. Since 1936 the Stiefel Furniture Co. had been indebted to the State Street Furniture Co., and on June 8, 1931, the amount of the indebtedness was $56,607.78. It was the practice of the Stiefel Furniture Co. to deposit all its receipts in its account in the Chicago Lawn State Bank, which was the only bank with which it had an account. The bank account of the State Street Furniture Co. was with the National Bank of the Republic. Each week the Stiefel Furniture Co. drew a check upon its account in the Chicago Lawn State Bank for its balance therein,

$1500, and the checks upon which the receiver had received the proceeds, in the sum of $170.75, and had stipulated should be preferred, and further recommending that the claim for preference, in the sum of $150.00 be denied and allowed as a general claim only.

To this report the petitioner filed objections, which were overruled and by order permitted to stand as exceptions. The exceptions were directed to that part of the report which allowed the preferred claim for $1,500.

Upon a hearing by the court, an order was entered sustaining the exceptions of the petitioning creditor, and directing in the recommend a preferred claim of $1,500, and limiting the respondent's preferred claim to the stipulated sum of $170.75, and that leave be given against the respondent for $500.00 and $50.00 for the cost of the proceedings, and also $87.50 of such costs against the petitioning creditor. It is from the entry of such order that this appeal is taken, the appeal being limited to that part of the order which denies a claim for preference upon the $1,500 check.

Upon the facts as set forth in the record, the Chicago Dawn State Bank closed and the bankers of public accounts of the State of Illinois took possession of its assets on June 6, 1921. For a considerable period of time prior thereto the Stifel Furniture Co. had been a depositor of that bank. Since 1908 the Stifel Furniture Co. had been indebted to the State Street Furniture Co., and on June 6, 1921, the amount of the indebtedness was $34,007.75. It was the practice of the Stifel Furniture Co. to deposit its receipts in its account in the Chicago Dawn St. Bank, which was the only bank with which it had an account. The bank account of the State Street Furniture Co. was with the National Bank of the Republic. Each week the Stifel Furniture Co. drew a check upon its account in the Chicago Dawn State Bank for its balance therein,

except $300 or $400, which balance was kept for petty cash purposes, and delivered the check to the State Street Furniture Co. to be applied on its indebtedness.

On June 8, 1931, the Stiefel Furniture Co. had a balance in its account at the Chicago Lawn State Bank of $2,319.84, and made deposits that day of $354.71, and drew, in addition to the check here in question, checks totaling $211.51. On that day Jerome Stiefel, who was the Secretary of the Stiefel Furniture Co. and State Street Furniture Co., drew a check for $2,200 on that account, which is the check here in question. The check was made payable to the order of Jerome Stiefel, and he took the check to the Chicago Lawn State Bank and requested that it be certified. The cashier of that bank placed a purported certification thereon, which was in words as follows: "Certified $2200.00. We certify to the genuineness of the signature of the maker only. Pay through Chicago Clearing House." This legend was followed by the signature of the Chicago Lawn State Bank by its cashier and the number of the purported certification. The check was then indorsed by Jerome Stiefel and the State Street Furniture Co., and on June 8, 1931, deposited to the account of the State Street Furniture Co. in the National Bank of the Republic, and the account of the Stiefel Furniture Co. with the State Street Furniture Co. was credited with the sum of $2,200. The Chicago Lawn State Bank, on June 8, 1931, immediately upon placing the purported certification on the check, charged the account of the Stiefel Furniture Co. with $2,200 and issued a certification debit in that amount.

On June 9, 1931, and for a considerable period prior thereto the Chicago Lawn State Bank was a non-affiliated member of the Chicago Clearing House Association, and its membership was pursuant to a written contract dated February 13, 1931, between that Bank and the

August 1907 or 1908, with balances are kept for each such account, and delivered the check to the State Street Furniture Co. to be applied on its indebtedness.

On June 3, 1921, the United Furniture Co. had a balance in its account at the Chicago Loan State Bank of $2,313.64, but much depreciated that day of $924.71, and there, in addition to the check here in question, checks totaling $411.83. To that day Frank Stakel, who was the Secretary of the United Furniture Co. and State Street Furniture Co., drew a check for $1,300 on that account, which is the check here in question. The check was made payable to the order of Jacobs Stakel, and he took the check to the Chicago Loan State Bank and requested that it be certified. The cashier of that bank signed a memorandum certification thereon, which was in words as follows: "Certified date 6.3.20. To certify to the genuineness of the signature of the maker only. Pay through Chicago Clearing House." This legend was followed by the signature of the Chicago Loan State Bank by its teller and the number of the memorandum certification. The check was then indorsed by Jacobs Stakel and the State Street Furniture Co., and on June 6, 1921, deposited to the account of the State Street Furniture Co. in the National Bank of the Republic, and the account of the United Furniture Co. with the State Street Furniture Co. was credited with the sum of $1,300. The Chicago Loan State Bank, on June 9, 1921, immediately upon placing the memorandum certification on the check, charged the account of the United Furniture Co. with $1,300 and issued a certification debit in that amount.

On June 9, 1921, and for a considerable period prior thereto the Chicago Loan State Bank was a non-affiliated member of the Chicago Clearing House Association, and its membership was terminated by a written contract dated February 12, 1921, between that bank and the

Chicago Clearing House Association, which contract provided among other things that all items received in the clearings by the Chicago Lawn State Bank should remain the property of the bank which presented the same to the Clearing House, and should be held in trust by the Chicago Lawn State Bank until the check given to the Clearing House by the Chicago Lawn State Bank for the same should actually be paid.

All clearings of non-affiliated members of the Chicago Clearing House were had at the early clearings, and the procedure in those clearings was that a representative of the Chicago Lawn State Bank would attend with a draft of the Chicago Lawn State Bank, drawn on the Continental Illinois Bank and Trust Co., which draft was prepared the preceding day with the amount thereof left blank. All checks drawn on the Chicago Lawn State Bank presented at the clearings would be delivered to that representative, who would then fill in the amount of the drafts in pencil in the sum represented by the checks so presented at that clearing, less the sum of the checks returned as dishonored by the Chicago Lawn State Bank from the previous day's clearings. The amount would then be verified by a Clearing House clerk and the pencil notation rewritten with a check writer.

On June 9, 1931, the check here in question was presented at the early clearing by the National Bank of the Republic. At that clearing checks, including the one in question, totaling the sum of $43,417.81, were presented which were drawn on the Chicago Lawn State Bank. The latter bank returned at that clearing dishonored checks in the sum of $1,354.41, leaving a net debit due from that bank to the Chicago Clearing House Association the sum of $41,963.41. The Chicago Lawn State Bank presented at that clearing checks drawn on other clearing banks totaling $43,884.81. There was no casting of

Estate Electric Power Association, with customer overhead among other things that all items involved in the discussion by the Board have been there from [illegible] when the property of the Park which presented the case to the Clearing House, had should be held in trust by the Chicago Loan Corp. Trust which will give to the Clearing House by the Chicago Loan Corp. [illegible] for the loan should actually be paid.

All checking of non-affiliated matters by the Clearing Clearing House was had at the early checking, but the procedure in those checkings was that a representative of the Chicago Loan Corp. would attend with a draft of the Chicago Loan Corp. drawn on the Continental Illinois Bank and Trust Co., which draft was presented the preceding day with the senior Bankers Joint Stock. All checks drawn on the Chicago Loan Corp. presented to the clearing would be delivered to that representative, who would then fill in the amount of the draft in [illegible] in the amount covered by the check so presented at that checking, less the sum of the amount returned as dishonored by the Chicago Loan Corp. from the previous day's clearing. The amount would then be verified by a Clearing House clerk and the proper motion [illegible] with a check attached.

On June 9, 1933, the check here in question was presented at the early checking by the Central Bank of the Temple. In that clearing checks, including the one in question, totaling the sum of $47,417.61, were presented which were drawn on the Chicago Loan Corp. Bank. The latter bank returned or sent clearing dishonored checks in the sum of $1,324.61, leaving a net draft due from that bank to the Chicago Clearing House Association the sum of $45,901.61. The Chicago Loan Corp. Bank presented at that clearing checks drawn on other clearing house totaling $45,924.61. There was no clearing of

balances between the credits due the Chicago Lawn State Bank from that clearing and debits due from it, but the representative of the Chicago Lawn State Bank inserted in the draft the amount of the net debit due from the Chicago Lawn State Bank of $41,963.41, and delivered the same to the Chicago Clearing House. At the time of delivery of that draft the Chicago Lawn State Bank had a credit balance with the Continental Illinois Bank and Trust Co. of $108,828.88, against which sum there were subsequent debits and returns of approximately $12,500. On that date the Chicago Lawn State Bank was indebted to the Continental Illinois Bank and Trust Co. in the sum of $207,300, which indebtedness was secured by collateral of the par value of $459,336.25. The draft delivered to the Clearing House Association by the Chicago Lawn State Bank was not paid by the Continental Illinois Bank and Trust Co. due to the closing of the Chicago Lawn State Bank.

On the date of closing, the Chicago Lawn State Bank had $25,758.92 cash on hand, and there was due it from banks other than the Continental Illinois Bank and Trust Co., as subsequently realized, $6,670.40. After the closing of the Chicago Lawn State Bank the Continental Illinois Bank and Trust Co. applied upon the indebtedness of the former bank to it the cash balance on deposit, together with sufficient of the collateral securing the loan to pay the indebtedness in full, and thereafter delivered to the Receiver of the Chicago Lawn State Bank the notes evidencing such indebtedness and the unapplied or unsold collateral which had been deposited with it. The actual value of such excess and returned collateral, as thereafter actually realized thereon by the Receiver, was in excess of the amount of the draft delivered to the Clearing House by the Chicago Lawn State Bank. After the draft was dishonored the check in question was returned by the National Bank of the Republic to the State Street

balances between the credits due the Chicago Loan State Bank from that clearing and debits due from it, but the representative of the Chicago Loan State Bank inserted in the draft the amount of the net debit due from the Chicago Loan State Bank of $1,[illegible].61, and delivered the same to the Chicago Clearing House. At the time of delivery of that draft the Chicago Loan State Bank had a credit balance with the Continental Illinois Bank and Trust Co. of $108,[illegible].88, against which sum there were subsequent debits and returns of approximately $12,800. On that date the Chicago Loan State Bank was indebted to the Continental Illinois Bank and Trust Co. in the sum of $[illegible],[illegible], which indebtedness was secured by collateral of the par value of $[illegible],[illegible].35. The draft delivered to the Clearing House Association by the Chicago Loan State Bank was not paid by the Continental Illinois Bank and Trust Co. due to the closing of the Chicago Loan State Bank.

On the date of closing, the Citizens Loan State Bank had $[illegible],[illegible].02 cash on hand, and there was due it from banks other than the Continental Illinois Bank and Trust Co., as nonreserve, realized, $[illegible],[illegible].40. After the closing of the Chicago Loan State Bank the Continental Illinois Bank and Trust Co. applied upon the indebtedness of the former bank to it the cash balance on deposit, together with sufficient of the collateral securing the loan to pay the indebtedness in full, and thereafter delivered to the receiver of the Chicago Loan State Bank the notes evidencing such indebtedness and the unapplied or unsold collateral which had been deposited with it. The actual value of such excess and returned collateral, as thereafter actually realized thereon by the receiver, was in excess of the amount of the draft delivered to the Clearing House by the Chicago Loan State Bank. After the draft was dishonored the check in question was returned by the National Bank of the Republic to the State street

Furniture Co. and charged back against the State Street Furniture Company's account, and the State Street Furniture Co. charged the account of the Stiefel Furniture Co. with like amount.

On September 1, 1931, the State Street Furniture Co. executed and delivered an assignment to the Stiefel Furniture Co. of all its right and claim in and on the check in question.

The claimant contends that where a drawee bank receives a check for collection and remittance, and charges the amount thereof against the account of the drawer but in lieu of remitting in cash delivers a draft upon another bank, the amount of the check must be regarded as collected and impressed with a trust in favor of the holder thereof, and in support of its theory states that the check in question was deposited with the National Bank of the Republic by the State Street Furniture Company, and by such deposit the National Bank of the Republic became the agent for the collection thereof of its depositor; and further suggests that the Chicago Clearing House was the collecting agent for the National Bank of the Republic and the paying agent for the Chicago Lawn State Bank. At the time when the check was presented to the Chicago Clearing House, the Chicago Lawn State Bank did not remit in cash but gave its draft for the amount of the check included in the number presented for collection on the Continental Illinois Bank and Trust Company, and it appears from the facts that there were funds on hand and to its credit with which to pay the checks that were drawn on the Chicago Lawn State Bank. The check in controversy was against this fund deposited with the Chicago Lawn State Bank, and was made payable to Jerome Stiefel, who was the secretary of the Stiefel Furniture Co. and also of the State Street Furniture Company, a corporation. The check which was made payable to him was presented to the Chicago Lawn State Bank, and was certified by the use of the following legend, as previously

Furniture Co. and charged back against the State Street Furniture Company's account, and the State Street Furniture Co. charged the account of the Titsel Furniture Co. with like amount.

On September 1, 1921, the State Street Furniture Co. executed and delivered an assignment to the Titsel Furniture Co. of all its right and claim in and to the check in question.

The claimant contends that there is Chicago bank received a check for collection and remittance, and charged the amount thereof against the accounts of the drawer but in lieu of remitting in cash delivered a draft upon another bank, the amount of the check was credited in collected and increased with a loss in favor of the judge thereof, and in support of its theory states that the check in question was deposited with the National Bank of the Republic by the State Street Furniture Company, and by such deposit the National Bank of the Republic became the agent for the collection thereof of its depositor; and further suggests that the Chicago Clearing House was the collecting agent for the National Bank of the Republic and the paying agent for the Chicago Lake State Bank. At the time when the check was presented to the Chicago Clearing House, the Chicago Lake State Bank did not credit in book but gave its draft for the amount of the check included in the master presented for collection on the Continental Illinois Bank and Trust Company, and it appears from the facts that there were funds on hand and to its credit with which to pay the checks that were drawn on the Chicago Lake State Bank. The chief in controversy was against this fund deposited with the Chicago Lake State Bank, and was made payable to Jerome Titsel, who was the secretary of the Titsel Furniture Co. and also of the State Street Furniture Company, a corporation. The check which was made payable to him was presented to the Chicago Lake State Bank, and was certified by the use of the following legend, as previously

stated in the statement of facts:

"Certified $2200.00. We certify to the genuineness of the signature of the maker only. Pay through Chicago Clearing House."

The check did not clear through the Chicago Clearing House and was assigned by the State Street Furniture Co. to the claimant.

A case has been called to our attention entitled People ex rel. Oscar Nelson v. Lincoln Trust & Savings Bank, 279 Ill. App. 18, wherein, upon a somewhat similar state of facts, after stating that an intervening petition had been filed and the report of the master was up for consideration, the court used this language:

"The master found the facts as alleged in the petition, and the certificate of evidence shows that on the day the check for $10,000 was drawn the bank made out a debit slip against the Sunnyside Oil Company for $10,000, which was marked paid on that date and delivered to the depositor, and that a similar debit slip was made out April 13th for the $1,870 against the petitioner's account with the bank, which was marked paid on that date. This slip also was delivered to the depositor.

It should be noted that these claims arose before the Act of 1931 went into effect on July 8, 1931, wherein it is provided that under the circumstances above narrated the holder of a certified check is entitled to a preferred claim. Ch. 16a, Par. 37, Illinois Statutes (Cahill) 1931.

The appealing receiver argues that the amounts of checks certified before this statute went into effect are not entitled to a preference, while the intervening petitioner argues to the contrary. A large number of cases can be cited holding in accordance with each view.

The statute above referred to is almost a copy of a similar statute enacted in the State of New York. (Neg. Inst. Law of N. Y., subdivision 2, sec. 350-1). In re Jayne v. Mason, 251 N.Y.S.768, indicates that the purpose of the act was to establish the rule of law which had been the subject of conflict in judicial decisions. This opinion cites a considerable number of cases in which preferences have been allowed in the absence of statute, and also a number of cases holding to the contrary. Some of these cases are cited in the briefs before us but we do not think it necessary to comment upon them for the reason that this court is already committed to the opinion that the holder of a certified check under similar circumstances as above is not entitled to a preferred claim. People ex rel. Nelson v. Builders & Merchants Bank, 264 Ill. App. 388.

In that case the intervening petitioner, Osterlind, withdrew something over $4,000 from his savings account and requested a cashier's check for this amount, which was given to him; the savings account was charged with the amount of this withdrawal and the cashier's check-stub ledger showed the issuance of the check for this amount; two days thereafter the bank failed to open;

stated in the statement of facts:

> "certified check, or certify to the genuineness of the signature of the maker only. Try through Jackson Harris Moore."

The check did not clear through the Chicago Clearing House and was returned by the State Street Bankers to the claimant.

A case has been cited to our attention entitled People ex rel. Cedar Rapids v. Lincoln Trust & Savings Bank, 279 Ill. App. 14, wherein, upon a somewhat similar state of fact, after stating that an intervening position had been filed and the report of the receiver was up for consideration, the court said this language:

> "The master found the facts as alleged in the petition, and the certificate of evidence shows that on the day the check for $10,000 was given the bank had a debit slip against the Lancy-Side Oil Company for $10,000, which was marked paid on that date and delivered to the depositor, and that a similar debit slip was made out April 17th for the $1,870 against the petitioner's account with the bank, which was marked paid on that date. This slip also was delivered to the depositor.
>
> It should be noted that these events occur before the act of 1921 went into effect on July 1, 1921, wherein it is provided that under the circumstances where accepted the holder of a certified check is entitled to a preferred claim. Ch. 16½, Par. 27, Illinois Statutes (Smith) 1921.
>
> The appellant receiver argues that the amounts of checks certified before this statute went into effect are not entitled to a preference, while the intervening petitioner argues to the contrary. A large number of cases can be cited holding in accordance with each view.
>
> The statute above referred to is almost a copy of a similar statute enacted in the State of New York. (Sec. Inst. Law of N. Y., subdivision 7, sec. 320-i). In re Dwyer v. Lemon, 201 N.Y.S. 705, indicates in 1 the purpose of the act was to establish the rule of law which had been the subject of conflict in judicial decisions. This opinion cites a considerable number of cases in which preferences have been allowed in the absence of statute, and also a number of cases holding to the contrary. Some of these cases are cited in the brief before us but we do not think it necessary to comment upon them for the reason that this court is already committed to the opinion that the holder of a certified check under similar circumstances as above is not entitled to a preferred claim. People ex rel. Kenyon v. Midland Merchants Bank, 344 Ill. 490.
>
> In such case the intervening petitioner, certified, withdrew something over $1,000 from its savings account and presented a cashier's check for this amount, which was given to him; the savings account was charged with the amount of this withdrawal and the cashier's check-stub ledger showed the issuance of the check for this amount; the day thereafter the bank failed to open;

the cashier's check given to the petitioner was deposited in another bank and was not paid. The petitioner's theory in that case was that by the withdrawal of the money from his account and the purchase of a cashier's check a trust was created in favor of the holder of the check. The receiver argued that the cashier's check was merely an evidence of the type of the deposit, being no different from money in the savings account from which the amount had just been deducted. We rested our opinion upon Clark v. Chicago Title & Trust Co. 85 Ill. App. 293, affirmed in 186 Ill. 440. That case involved a cashier's check. The Supreme Court said that this was, in legal effect, the same as a certified check. The opinion also said, quoting from the opinion of the Appellate Court; 'The drawing of the cashier's check, even if it changed the form of indebtedness, did not change the fact. The Globe Savings Bank was still indebted to the appellant for the $3,000 represented by its cashier's check. There was no change in the nature of the debt. The only change was in the evidence of it.'

In our opinion in the Osterlind case we held that the transaction did not create a trust; that there was merely a change in form of the evidence of indebtedness - that is, a change from money in the depositor's account to a cashier's check. The same is true in the instant case. There was merely a change of money from the depositor's account to a certified check of the bank.

Petition for certiorari in the Osterlind case was denied by the Supreme Court, 264 Ill. App. xiv."

The opinion in that case is, in a measure, applicable to the facts in the instant case. The respondent, however, contends that the opinion from which we have quoted is erroneous when considered in the light of prior decisions involving certification of checks, and seeks to distinguish the case by citing a number of cases passed upon both by the Supreme Court and the Appellate Court prior to the passage of the Negotiable Instrument Act, which act was passed subsequent to the issuance of the check in question, (Ill. Bar. Stats. 1935, Ch. 96, Sec. 210) and provides that a check of this character "does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." Of course this provision of the statute which has been changed by the enactment of the provision just quoted from, can have no bearing on the question involved in this appeal. While it is true that the check was presented and the account charged with the amount of the certified

the cashier's check given to the petitioner was tantamount in another bank and was not paid. The petitioner's theory in that case was that by the withdrawal of the money from the account and the procure of a cashier's check a trust was created in favor of the holder of the check. The receiver argued that the cashier's check was merely an evidence of the type of the deposit, being no different from money in the savings account from which the amount had just been withdrawn. The trustee cite Gulick v. Gulick Title & Trust Co., 85 Ill. App. 592, affirmed in 186 Ill. 464. That case involved a cashier's check. The Supreme Court held that this was, in legal effect, the same as a certified check. The opinion also said, quoting from the opinion of the Appellate Court; 'the drawing of the cashier's check, upon it is assumed the face of transaction, did not change the fact. The Globe Savings Bank was still indebted to the appellant for the $1,000 represented by its cashier's check. There was no change in the nature of the fact. The only change was in the evidence of it.'

In our opinion in the Cartwright case we said that the transaction did not create a trust; that there was merely a change in form of the evidence of indebtedness - that is, a change from money in the depositor's account to a cashier's check. The case is true in the instant case. There was merely a change of money from the depositor's account to a certified check of the bank.

Nothing for petitioner's in the Gulick case was denied by the Supreme Court, 186 Ill. 464. Ely.

The opinion in that case is, in a measure, applicable to the facts in the instant case. The petitioner, however, contends that the opinion from which we have quoted is erroneous when considered in the light of later decisions involving certification of checks, and seeks to distinguish the case by citing a number of cases decided upon both by the Supreme Court and the Appellate Court prior to the passage of the Negotiable Instruments Act, which act has passed subsequent to the issuance of the check in question. (Ill. Ann. Stats. 1925, Ch. 16, Sec. 210) and provides that a check of this character 'does not operate to an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.' Of course this provision of the statute which has been changed by the enactment of the previous just quoted item, can have no bearing on the question involved in this appeal. While it is true that the check was presented and the account charged with the amount of the certified

check, still such fact does not entitle respondent to a preferred claim; on the contrary, the check was certified as to the genuineness of the signature, and there is nothing that changes the character of the account, except as was stated in the case from which we have quoted that "there was merely a change of money from the depositor's account to a certified check of the bank."

The failure of the Chicago Lawn State Bank to pay this check did not change the character of the deposit, and we believe the facts are such that the court was justified in refusing to allow a preferred claim for $2,200, and that the court was fully justified in entering the order appealed from.

ORDER AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

about, still such that does not entitle respondent to a preferred claim; on the contrary, the court was entitled to the presumption of the rightness, and there is nothing that brings the decision of the account, except it may be stated in the bare fact which we have noted that "there was merely a change of money from the respondent's account to a certain count of the work."

The history of the claim has been here back to my this court did not change the operates of the claimant, and we believe the facts are such that the court was justified in refusing to allow a preferred claim for it, and that the court was fully justified in ordering the order appealed from.

GEORGE ALLEN.

JAMES E. DUFFIELD AND WALL, JJ. CONCUR.

39762

PAUL GAUTHIER,

Plaintiff-Appellee,

v.

STEVE J. MACIEJEWSKI, City Clerk of the City of Calumet City, Illinois,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

24A

295 I.A. 617

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order of the court granting a writ of mandamus directing the defendant to forthwith countersign the payroll checks for the payment of salaries due to the plaintiff for the first half of the month of June, 1937, and to countersign all of the other payroll checks for employees and officials mentioned and designated in the payrolls for the first half of June, 1937.

The petition for mandamus alleges that the City of Calumet is a municipal corporation and that Steve J. Maciejewski, the defendant, was duly elected and qualified and is now the acting City Clerk of said City. The petition further alleges that the petitioner is now and for more than two years last past has been a member of the Calumet City Fire Department, and that he is of the rank of captain; that on the 30th day of April, 1937, the City of Calumet passed its annual appropriation bill for the current municipal fiscal year; that in and by said appropriation bill the city did appropriate such sums of money as it deemed necessary to defray all the necessary expenses and liabilities of said City, including provisions for the salary of the petitioner and also including therein provisions for the salaries and wages of all of the officials and other employees of the City.

It further appears from the petition that for many years last past the City has and does now maintain and operate a regular

corporate function, a fire department consisting of six men; that your petitioner is one of them; that the salaries of said six men are now and for more than two years last past have been continued to be fixed at the rates set forth in the payroll sheets; that the salaries and wages of the other city employees and officials have likewise been and are fixed; that your petitioner did from the 15th day of May, 1937, to the 31st day of May, 1937, perform all of the duties of his said office, as member of said fire department, and that his salary therefor is the sum of $70; that his name was included in the payroll for the last half of the month of May, 1937.

It also appears from the petition that the names of the officials and employees of the City of Calumet were included in the payroll, for the last half of May, 1937, together with the amounts due and owing those respectively named, and it further appears from the petition that the petitioner did from the 1st day of June, 1937, to the 15th day of June, 1937, perform all of the duties of his office as a member of said fire department, and that his salary is $70, and that his name was included in the payroll, together with all the other officials and employees, and the amount due each of those named, for the first half of the month of June, 1937, and that the names of the several parties therein are set forth in the petition.

It is further alleged that there is no dispute as to the amount due and owing to the petitioner, nor is there any dispute as to the amount of salary or wages due and owing to any of the persons listed and named in said payroll schedules; that said payroll schedules were and each of them was duly approved by Edward F. Eggebrecht, chairman of the Finance Committee, consisting of three Councilmen of the City of Calumet, and by Emil Seehausen, a member thereof.

It is further alleged that there were sufficient funds on deposit in the depositary bank of said City and to the credit of the

materials function, the important consisting of his own; that your petitioner is one of them, but the guarantee of said his rate are not and for more than the person last just been been continued to be there at the rates set forth in the payroll annexed; that the salaries and wages of the other city employees and officials have likewise been and are fixed; that your petitioner sit from the 1st day of May, 1907, to the 31st day of May, 1907, performed all of the duties of his said office, in number of said fire department, and that his salary thereof is the sum of $75; that he was not excluded in the payroll for the last half of the month of May, 1907.

It also appears from the petition that the names of the officials and employees of the city of Delmont were included in the payroll, for the last half of May, 1907, together with the amounts and using fixed respectively owed, and it further appears from the petition that the petitioner sit from the 1st day of June, 1907, to the 15th day of June, 1907, perform all of the duties of his office as a member of said fire department, and that his salary is $75, and that his name was included in the payroll, together with all the other officials and employees, and the reason for each of those owed, for the first half of the month of June, 1907, and that the names of the several petitioners therein are set forth in the petition.

It is further alleged that there is no dispute as to the amount due and owing to the petitioner, but is there any dispute as to the amount of salary or wages the last owing to any of the persons listed and owed in said payroll annexed; that said payroll schedule was and such of them was duly approved by Robert E. Kyzerright, chairman of the finance committee, constituting of three councilmen of the city of Delmont, and by that ordinance, a member thereof.

It is further alleged that there were sufficient funds on deposit in the monetary fund of said city and to the credit of the

various accounts appropriated for, to pay the salary due the petitioner and to pay the salaries and wages due City officials and employees, as set forth in said payroll.

It further appears from the petition that checks had been prepared payable to the petitioner and to each and every official and employee named in said payrolls, and that said checks were and each of them was signed by William F. Zick, mayor of said City, and by Julius Mayer, treasurer of said City, and that said checks were due and delivered to and are now in possession of Steve J.Maciejewski, the City clerk; that numerous demands had been made on said City clerk to countersign said payroll checks, and that said City clerk has failed and refused to countersign any or either of them.

To this petition the defendant filed his answer, in which as a defense he charges that there is no legally existing fire department in Calumet City; that the plaintiff was never legally appointed a member of the fire department; that the City never legally passed an annual appropriation order for the year 1937, and that the payroll in question was never legally audited and approved by the City Council.

Upon a hearing and the evidence introduced the court entered an order that a writ of mandamus, directed to Steve J.Maciejewski, City Clerk of the City of Calumet City, County of Cook, and State of Illinois, issue forthwith commanding him to countersign the payroll checks for the payment of salaries due to the petitioner for the first half of the month of June, 1937, and to countersign all of the other payroll checks for all of the employees and officials mentioned and designated in the payroll for the first half of the month of June, 1937.

The petitioner contends on this appeal that the action of the trial court in entering the order appealed from must be presumed to be free from error unless the contrary is made to appear from the record filed in this court, and since the record filed here does not

victims accounts incorrectly for, to pay the salary due the petitioner and to pay the salaries and wages due city officials and employees, as set forth in said payroll.

It further appears from the petition that checks had been prepared payable to the petitioner and to each and every official and employee named in said payroll, and that said checks were each of them was signed by William T. Cox, mayor of said city, and by Julius Dyer, treasurer of said city, and that said checks were duly and delivered to and are now in possession of Dave L.Montgomery the city clerk; that numerous demands had been made on said city clerk to countersign said payroll checks, and that said city clerk has failed and refused to countersign any or either of them.

To this petition the defendant filed its answer, in which he admits or denies as follows that there is an legally existing city department in Kansas City; that the plaintiff was never legally appointed a member of the fire department; that the city never legally passed an annual appropriation order for the year 1927, and that the payroll in question was never legally audited and approved by the city Council.

Upon a hearing and the evidence introduced the court entered an order that a writ of mandamus, directed to Dave L.Montgomery, city clerk of the city of Kansas City, county of Jackson, state of Illinois, issue forthwith commanding him to countersign the payroll checks for the payment of salaries due to the petitioner for the first half of the month of June, 1927, and to countersign all of the other payroll checks for all of the employees and officials mentioned and designated in the payroll for the first half of the month of June,1927.

The petitioner contends on this appeal that the action of the trial court in sustaining the order appealed from must be reversed on the first ground that the mandatory is made to appear from the record filed in this court, and since the record filed with the lower

contain a report of the proceedings at the trial it must be presumed that the facts established at the trial were such as to require the order which the trial court entered. It appeared from the order entered by the court that evidence was heard to justify the court's findings, and we will assume from such findings that the order is sustained by the evidence heard. The rule of law is well established that where it appears from the record that evidence was heard and there was a failure to include the evidence in the record, it is our duty to presume that the court was justified from the evidence in entering the order. That rule applies in this case. As we have already indicated, no evidence was incorporated in the record, and therefore we are unable to determine whether objections were made to the admission of evidence, or that the particular findings are sustained by the evidence.

For the reasons stated the order is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

contain a report of the proceedings of the trial. It must be presumed that the facts established at the trial were such as to warrant the order which the trial court entered. It appears from the order entered by the court that evidence was heard to justify the court's findings, and we will assume from such findings that the order is sustained by the evidence heard. The rule of law is well established that where it appears from the record that evidence was heard and there was a failure to include the evidence in the record, it is our duty to presume that the court was justified from the evidence in entering the order. That rule applies in this case. As we have already indicated, no evidence was incorporated in the record, and therefore we are unable to determine whether objections were made to the admission of evidence, or that the particular findings are sustained by the evidence.

For the reasons stated the order is affirmed.

CROSS, J., concurs.

DENIE v. HOLLIVER AND BELL, JJ., dissent.

39809

NORMAN NICHOLSON,

(Plaintiff) Appellee,

v.

ERNEST T. KURZDORFER and ROSE VARGA,

Defendants,

On Appeal of ERNEST T. KURZDORFER,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

295 I.A. 617

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by Ernest T. Kurzdorfer from a judgment for $500 entered on July 22, 1937, in the Municipal Court of Chicago, wherein the court found the issues for the plaintiff Norman Nicholson and against Ernest T. Kurzdorfer and Rose Varga, defendants.

Norman Nicholson, the plaintiff, by his statement of claim filed on May 6, 1936 alleged that on the 31st day of October, 1934, he entered into an agreement with Ernest T. Kurzdorfer, a copy of which agreement is attached to the statement of claim and marked "Exhibit A."

This exhibit is a copy of the lease between Ernest T. Kurzdorfer, as lessor, and Norman Nicholson, as lessee, for the public garage located at 5121-29 North Damen Avenue, Chicago, Illinois, said lease beginning November 1, 1934, expiring October 31, 1936, and reciting a monthly consideration of $150.

To the lease a rider is attached, which forms a part of the agreement between the parties and is as follows:

"It is expressly understood and agreed that in the event said Lessor shall sell said demised premises and property, this lease shall, at the option of said lessor, be subject to special cancellation.

It is further agreed that if and when said property is sold by Lessor, Lessee agrees, upon receiving 60 days prior written notice of such cancellation, to peacefully and promptly vacate said demised premises on or before the expiration of the

Appeal from
Municipal Court
of Chicago.

Judge Sullivan.

(Plaintiff) Appellee,

v.

Albert T. Burkhardt and Joan Vogel,

Defendants,

On Appeal of Albert T. Burkhardt,

(Defendant) Appellant.

MR. JUSTICE MCGOOEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Albert T. Burkhardt from a judgment for $500 entered on July 24, 1957, in the municipal court of Chicago, wherein the court found the issues for the plaintiff Joseph Kirkman and against Albert T. Burkhardt and Joan Vogel, defendants.

Joseph Kirkman, the plaintiff, by his statement of claim filed on July 4, 1956 alleged that on the 21st day of October, 1955, he entered into an agreement with Albert T. Burkhardt, a copy of which agreement is attached to the statement of claim and marked "Exhibit A."

This exhibit is a copy of the lease between Albert T. Burkhardt, as lessor, and Joseph Kirkman, as lessee, for the public garage located at 2121-29 North Damen avenue, Chicago, Illinois, with lease beginning November 1, 1955, expiring October 31, 1956, and reciting a monthly consideration of $150.

In the lease a rider is attached, which forms a part of the agreement between the parties and is as follows:

"It is expressly understood and agreed that in the event said lessor shall sell said leased premises and property, this lease shall, at the option of said lessor, be subject to special cancellation.

It is further agreed that if and when said property is sold by lessor, lessee agrees, upon receiving 60 days prior written notice of such cancellation, to peacefully and orderly vacate said leased premises on or before the expiration of the

60 day period; and if and when Lessee vacates said premises in good condition and clear of encumbrance on or before April 30, 1936, on account of such notice, Lessor agrees to pay and Lessee agrees to accept $500 as full liquidated damages."

There is an assignment in writing on the back page of the lease, which is as follows:

"In consideration of $1.00 to me in hand paid, I hereby transfer, assign and set over to Rose Varga and assigns my interest in the within Lease, and the rent thereby secured from May 1, 1936.
Witness my hand and seal this 22nd day of April, A. D. 1936.

Ernest T. Kurzdorfer (Seal)"

It is further alleged in plaintiff's statement of claim that the defendant Kurzdorfer assigned his interest in the said agreement to the defendant Rose Varga, on April 22, 1936, and that she accepted said assignment.

It is further alleged that on April 25, 1936, a written notice, a copy of which is marked "Exhibit B" and attached to the statement of claim, was served upon the plaintiff, Norman Nicholson, and that on April 30, 1936, he vacated the premises leaving the same in good condition and clear of encumbrances. Exhibit B is a copy of the notice dated April 25, 1936, advising that Rose Varga purchased the above described property and that Ernest T. Kurzdorfer assigned the aforesaid lease to her, and that said lease was cancelled by said notice, and that Norman Nicholson was expected to vacate the premises before June 25, 1936. This notice was signed by Rose Varga by Samuel S. Siegel, her attorney.

On May 27, 1936, Ernest T. Kurzdorfer, by his attorney, filed a motion to strike the statement of claim for the reason that said statement of claim did not show that the lease in question was ever cancelled by or at the option of Ernest T. Kurzdorfer, and that no cause of action was stated against the said defendant. This motion to strike was overruled by the court, and on June 6, 1936,

30 day period; and if such seen lessee receive a 14 premium in good condition and also a of conservation on or before April 30, 1933, on account of such notice, lessor agrees to pay and lessee agrees to accept 1930, as full liquidated damages."

There is no endorsement in writing on the back hereof of the lease, which is as follows:

"In consideration of $1.00 in hand paid, I hereby ratify, revive and set over to lessee herein and assigns my interest in the within lease, and not prior thereby assigned from May 1, 1932.

"Witness my hand and seal this 22nd day of April, A. D. 1930.

(Sgd.) C. Bierbrier (Seal)"

It is further alleged in plaintiff's statement of claim that the defendant Bierbrier assigned his interest in the said agreement to the defendant John Brown, on April 30, 1932, and that he accepted said assignment.

It is further alleged that on April 24, 1932, a written notice, a copy of which is marked "Exhibit E" and attached to the statement of claim, was served upon the plaintiff, Brown Bierbrier, and that on April 30, 1932, he vacated the premises leaving the same in good condition and clear of encumbrances. Exhibit E is a copy of the notice dated April 25, 1932, setting out that Brown Bierbrier based the alleged abandonment property and that Lessor C. Bierbrier assigned the aforesaid lease to her, and that said lessor was notified by said notice, and that Brown Bierbrier was requested to vacate the premises before June 24, 1932. This notice was signed by Jane Lessor by Samuel L. Lloyd, her attorney.

On May 27, 1932, Grant E. Bierbrier, by his attorney, filed a notice to write the statement of claim for the reason that said statement of claim did not show that the lease in question was ever cancelled by or at the option of Lessor C. Bierbrier, and that so cause of action was stated against the said defendant. This notice to strike was overruled by the court, and on June 3, 1932,

Ernest T. Kurzdorfer, pursuant to leave of court, filed an affidavit of defense, by which he denied his indebtedness to the plaintiff, which affidavit of defense was stricken pursuant to motion of plaintiff by order of court on July 9, 1936, which order granted the defendant leave to file an amended affidavit of defense.

Pursuant to said order the defendant, Ernest T. Kurzdorfer, on July 20, 1936, filed an amended affidavit of defense, denying that the defendant, Rose Varga, had any authority to serve the notice of cancellation, and further alleging that service of cancellation was made without any knowledge or consent on the part of the defendant Ernest T. Kurzdorfer.

The case was heard before the court without a jury, and on March 26, 1937, after a hearing, the court found the issues for the plaintiff and against the defendants, Ernest T. Kurzdorfer and Rose Varga, and assessed the damages at $500.

On motion of the defendant, Rose Varga, the court on July 22, 1937, granted a new trial and proceeded to a hearing instanter, after which, on the same day, the court again found the issues for the plaintiff and against the defendants and entered judgment for $500. Thereafter, the defendant Ernest T. Kurzdorfer, filed a notice of appeal, and moved the court for a supersedeas, which was granted.

The defendant Kurzdorfer, who alone is in this court on appeal, urges a reversal of the judgment on the ground that the pleadings of the plaintiff are insufficient to sustain the verdict.

As we have already stated regarding plaintiff's statement of claim, it appears therefrom that Kurzdorfer rented the building described in the lease to the plaintiff, to be used as a garage property, for a term beginning November 1, 1934, and expiring October 31, 1936, at a monthly rental of $150.

Ernest T. Bearbotter, seeking to leave of court, filed an affidavit of defense, by which he denied his indebtedness to the plaintiff, which affidavit of defense was stricken pursuant to motion of plaintiff by order of court on July 5, 1930, which order granted the defendant leave to file an amended affidavit of defense.

Pursuant to said order the defendant, Ernest T. Bearbotter, on July 30, 1930, filed an amended affidavit of defense, denying that the defendant, Rose Torp, had any authority to serve the notice of cancellation, and further alleging that service of cancellation was made without any knowledge or consent on the part of the defendant Ernest T. Bearbotter.

The case was heard before the court without a jury, and on March 26, 1937, after a hearing, the court found the issues for the plaintiff and against the defendants, Ernest T. Bearbotter and Rose Torp, and assessed the damages at $300.

On motion of the defendant, Rose Torp, the court on July 23, 1937, granted a new trial and proceeded to a hearing instant after which, on the same day, the court again found the issues for the plaintiff and against the defendants and entered judgment for $300. Therefore, the defendant Ernest T. Bearbotter, filed a notice of appeal, and moved the court for a <u>supersedeas</u>, which was granted.

The defendant Bearbotter, who alone is in this court on appeal, urges a reversal of the judgment on the ground that the pleadings of the plaintiff are insufficient to sustain the verdict.

As we have already stated regarding plaintiff's statement of claim, it appears therefrom that Bearbotter rented the building described in the lease to the plaintiff, to be used as a garage property, for a term beginning November 1, 1934, and ending October 31, 1936, at a monthly rental of $100.

A rider attached to the lease, the subject of this controversy, provided that if the lessor should sell the property, the lease at his option should become subject to special cancellation by giving 60 days' prior written notice to the lessee, and if he, the lessee, should on account of such notice vacate the premises in good condition and free from encumbrances on or before April 30, 1936, the lessor would pay $500 as liquidated damages. The fact is undisputed that Kurzdorfer subsequently sold the property to Rose Varga, on April 22, 1936, and assigned his interest in the lease to her from May 1, 1936.

It was after the assignment of the lease that Rose Varga, on April 25, 1936, served notice on the plaintiff advising him that she had purchased the property and that Kurzdorfer had assigned the lease to her, and that by the giving of notice the lease was cancelled and the plaintiff was expected to vacate the premises before June 25, 1936.

From the admitted facts it appears that notice was not served by Kurzdorfer, and the suggestion is made that by reason of the reservation to himself of his rights under the lease until May 1, 1936, the purchaser Rose Varga was without any authorization from Kurzdorfer to cancel the lease.

The defendant Kurzdorfer contends that the plaintiff's statement of claim is insufficient in that it does not set forth a cause of action against the defendant Ernest T. Kurzdorfer, and therefore will not sustain the verdict and the judgment, and he further contends that the question of insufficiency of the statement of claim in support of the judgment may be raised in the Appellate Court by assignment of error even though a motion to strike the complaint has been overruled and an affidavit of merits filed.

The answer of the plaintiff to this contention is:

(1) On appeal from a fourth class Municipal Court judgment

A right attached to the lease, the subject of this controversy, provided that if the lessor should sell the property, the lease at his option should become subject to special cancellation by giving 60 days' prior written notice to the lessee, and if he, the lessee, should on account of such notice vacate the premises in good condition and free from encumbrances on or before April 30, 1926, the lessor would pay $500 as liquidated damages. The fact is undisputed that Burkhofer subsequently sold the property to one Vargo, on April 24, 1926, and assigned his interest in the lease to her from May 1, 1926.

It was after the assignment of the lease that Rose Vargo, on April 29, 1926, served notice on the plaintiff advising him that she had purchased the property and that Burkhofer had assigned the lease to her, and that by the giving of notice the lease was cancelled and the plaintiff was expected to vacate the premises before June 30, 1926.

From the admitted facts it appears that notice was not served by Burkhofer, and the suggestion is made that by reason of the reservation to himself of his rights under the lease until May 1, 1926, the purchaser Rose Vargo was without any authorization from Burkhofer to cancel the lease.

The defendant Burkhofer contends that the plaintiff's statement of claim is insufficient in that it does not set forth a cause of action against the defendant Lucas T. Burkhofer, and therefore this will not sustain the verdict and the judgment, and he further contends that the question of insufficiency of the statement of claim in support of the judgment may be raised in the appellate court by assignment of error even though a motion to strike the complaint has been overruled and an affidavit of merits filed.

The answer of the plaintiff to this contention is:

(1) On appeal from a fourth class municipal court judgment

after a trial of the issues by the Court, the record of the proceedings at the trial not being made a part of the record in this court, it will be presumed that any defect in the statement of claim was cured by the finding, and this is true even though there is a complete failure of the statement of claim to state a cause of action.

(2) That the statement of claim does state a cause of action, and in support of plaintiff's position he quotes the following from Par. 395, Ch. 37 Ill. Rev. State. 1937, the same being sec. 40 of the Municipal Court Act:

> "That every case of the fourth class mentioned in section (2) of this Act * * * brought in the Municipal Court shall be commenced by the filing by the plaintiff with the clerk of a praecipe for a summons, * * * and a statement of the nature of the plaintiff's claim * * *. In all cases of the fourth class mentioned in said section two (2) of this act, the Municipal Court may adopt such rules and regulations as it may deem necessary to enable the parties, in advance of the trial to ascertain the nature of the plaintiff's claim or claims * * *."

And further, the plaintiff calls our attention to the case of McGlynn v. Gillespie, 327 Ill. App. 400, and quotes from this opinion in support of his position as stated by him, which quotation is as follows:

> "So, it will be seen, that the history of this subject shows the Supreme Court has considered, with great care, the important question of pleading in fourth-class cases in the Municipal Court, and, from an early inclination, as shown in the Gillman case, supra, towards the rigorous requirements of common-law pleading, that the statement of claim should state a cause of action, has reached the conclusion that all that should be required in such cases is a statement of sufficient facts reasonably to inform the defendant of the claim against him, and that it is not necessary to state sufficient facts to make out a cause of action."

The answer of this defendant to the suggestion made by the plaintiff is that it is not information which the defendant does not have which prevents the plaintiff from having a cause of action, but rather the information which the plaintiff has and which he sets up under a sworn statement of claim; that is, his admission that the assignment from the defendant, Kurzdorfer, to the defendant Varga became effective on May 1, 1936, the alleged claim being based on the

after a trial of the issues by the Court, the record of the proceedings of the trial not being made a part of the record in this court, it will be presumed that any defect in the statement of claim was cured by the finding, and this is true even though there is a complete failure of the statement of claim to state a cause of action.

(2) That the statement of claim does state a cause of action, and in support of plaintiff's position he quotes the following from Ex. 345, Ch. 72 Ill. Rev. Stats. 1937, the same being sec. 40 of the municipal Court act:

> "That every case of the fourth class mentioned in section (2) of this act " " brought in the municipal Court shall be commenced by the filing by the plaintiff with the clerk of a proceeding for a summons, " " and a statement of the nature of the plaintiff's claim " " . In all cases of the fourth class mentioned in said section two (2) of this act, the municipal Court may adopt such rules and regulations as it may deem necessary to simplify the pleadings, in advance of the trial to ascertain the nature of the plaintiff's claim or claims " " ."

And further, the plaintiff calls our attention to the case of Williams v. Gillespie, 217 Ill. App. 400, and quotes from this opinion in support of his position as stated by him, which quotation is as follows:

> "So, it will be seen, from the history of this subject above the Supreme Court has construed, with great care, the important question of pleading in fourth-class cases in the municipal Court, and, from an early tribunal, as shown in the Williams case, supra, towards the liberal requirements of common-law pleading, that the statement of claim should state a cause of action, but required the court also that all that should be required in such cases is a statement of sufficient facts to be related in such cases in a statement of sufficient facts reasonably to inform the defendant of the claim against him, and that it is not necessary to state sufficient facts to make out a cause of action."

The answer of this defendant to the suggestion made by the plaintiff is that it is not information which the defendant does not have which prevents the plaintiff from having a cause of action, but rather the information which the plaintiff has and which he sets up under a sworn statement of claim; that is, his admission that the assignment from the defendant, Kurschner, to the defendant Perry became effective on May 1, 1934, the alleged claim being based on the

notice from Varga dated April 25, 1936. The plaintiff has set forth affirmative facts which defeat his claim and which no legitimate amendment can save from being demurrable.

In reply to the suggestion that the statement of claim does not state a cause of action, we have quoted the section of the Municipal Court Act relating to fourth class cases, which provides for the procedure necessary to state a cause of action, and upon the question here involved, this court in the case of McClunn v. Gillespie, supra, construed the provision relating to pleadings in fourth class cases by reaching the conclusion that the rigorous requirements of common-law pleading do not apply to such a statement of claim, and that it is sufficient if the statement of claim alleges "facts reasonably to inform the defendant of the claim against him, and that it is not necessary to state sufficient facts to make out a cause of action".

Adopting the reasoning in this case and applying the rule as stated, the facts alleged in the statement of claim in the instant case are sufficient to advise the defendant of the cause of action against him, and we are of the opinion that the statement is sufficient to justify the court in considering the matter for the purpose of passing upon the questions involved.

The real question in this case is whether the assignment quoted in our opinion is sufficient to justify the giving of notice by the defendant, Rose Varga, as lessor. From the assignment itself the defendant Kurzdorfer assigned and set over to Rose Varga his interest in the lease and the rents thereby secured, to take effect from May 1, 1936. The language of the assignment is not ambiguous, and it is clear that Kurzdorfer's interest passed by assignment to Rose Varga from and after May 1, 1936. Therefore the defendant Kurzdorfer, not having given the notice required by the agreement between the parties, the

notice from their legal equal to, same. The similarity has not been sufficiently close which defeat the claim and which be legitimate assignment can have true value contracts.

In reply to the suggestion that the statement of claim does not state a cause of action, we have noted the action of the municipal court in relieving the Fourth class cases, which provides for the procedure necessary to state a cause of action, and even the evidence here involved, this court in the case of Collins v. Williams, supra, affirmed the provision relating to plaintiffs to lower class cases by holding the association that the rigorous requirements of common-law pleading do not apply to such a statement of claim, and that it is sufficient if the statement of claim alleges 'facts reasonably to inform the defendant of the claim against him, and that it is not necessary to state ultimate facts to make out a cause of action'.

Applying the reasoning in this case and applying the rule as stated, the facts alleged in the statement of claim in the instant case are sufficient to allege the commencement of the cause of action against him, and as one of the counsel said the statement is sufficient to justify the court in considering the matter for the purposes of passing upon the questions involved.

The real question in this case is whether the assignment sued in our opinion is sufficient to justify the giving of notice by the defendant, Jane Doe, to issuer. From the assignment itself the defendant Kurzcrafter assigned and set over to Jane Doe the interest in the lease and the same thereby assumes, to make effect from May 1, 1956. The language of the assignment is set forth, and it is clear this Kurzcrafter's interest passed by assignment to Jane Doe from and after May 1, 1956. Therefore the interest Kurzcrafter, not having given the notice required by the agreement between the parties, the

plaintiff, lessee, by vacating the premises, cannot recover the $500 provided for in the lease as liquidated damages from the defendant Kurzdorfer.

For the reasons stated we are of the opinion that the court erred in entering judgment for $500 for the plaintiff and against the defendants. The judgment is reversed.

JUDGMENT REVERSED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

liability, issues, by verifying the creditor, cannot recover the 1000 provided for in the bond on liquidated damages from the defendant Carnicofer.

For the reasons stated we are of the opinion that the court erred in entering judgment for 1000 for the plaintiff and against the defendants. The judgment is reversed.

Judgment reversed.

CASE 2. CONTINUE AND CASE 33, FOLLOW.

39829

JULES EICHENBAUM, Successor-Trustee,

Plaintiff-Appellant,

v.

STATE AND QUINCY BUILDING CORPORATION, et al.,

Defendants.

ISA W. KAHN, et al.,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

295 I.A. 617

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order entered on July 15, 1937, wherein the court denied the motion of the plaintiff for the removal of Isa W. Kahn, the owner of the premises, from possession of the premises in question or to appoint a receiver; to surrender possession to the successor-trustee; that no further payment be made on taxes; and that Kahn be required to return the 4 per cent of the gross income, which he received from 1932 to 1937.

On October 11, 1932, a foreclosure proceeding was instituted in the Circuit Court of Cook County, Illinois, by Greenebaum Sons Investment Company, and Percy Cowan, as reorganization managers, to foreclose the lien of that certain trust deed from State and Quincy Building Corporation, to Greenebaum Sons Bank and Trust Company, as trustee, dated October 31, 1924, and recorded in the Recorder's Office of Cook County, Illinois, which trust deed conveyed certain leasehold estates therein described, covering the premises commonly known as and located at 214-220 South State Street, Chicago, Illinois.

On October 22, 1932, the court before whom the proceedings were then pending entered an order finding, among other things, that Isa W. Kahn was the owner of the premises described in the bill of complaint and in possession of the same, and directing that he remain in possession of said premises and manage and operate the same upon the filing of a bond as provided by the statute in such cases made

JULES KIMBERLEIN, successor-trustee,	
Plaintiff-Appellee,	
v.	
STATE AND QUINCY BUILDING CORPORATION, et al.,	
Defendants.	
IDA M. KAHN, et al.,	
Defendants - Appellees.	

MR. PRESIDING JUSTICE MICHEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order entered on July 16, 1937, wherein the court denied the motion of the plaintiff for the removal of Ida M. Kahn, the owner of the premises, from possession of the premises in question or to appoint a receiver; to surrender possession to the successor-trustee; that no further payment be made on taxes; and that Kahn be required to return the 4 per cent of the gross income, which he received from 1932 to 1937.

On October 11, 1932, a foreclosure proceeding was instituted in the Circuit Court of Cook County, Illinois, by Greenebaum Sons Investment Company, and Percy Owen, as reorganization manager, to foreclose the lien of that certain trust deed from State and Quincy Building Corporation, to Greenebaum Sons Bank and Trust Company, as trustee, dated October 21, 1921, and recorded in the Recorder's Office of Cook County, Illinois, which trust deed conveyed certain leasehold estates therein described, covering the premises commonly known as and located at 314-320 South State Street, Chicago, Illinois.

On October 22, 1932, the court before whom the proceedings were then pending entered an order finding, among other things, that Ida M. Kahn was the owner of the premises described in the bill of complaint and in possession of the same, and directing that be remain in possession of said premises and manage and operate the same upon the filing of a bond as provided by the statute in such cases made

and provided. The order further authorized him to retain a sum of money equivalent to 4% of the gross revenue from the said premises to defray the cost of managing the same. The bond required by the order was duly filed and approved by the court, and since that time Isa W. Kahn has been in continuous possession of the premises described in said trust deed and has operated and managed the same, pursuant to the order of the court.

On November 1, 1932, Etta King, a bondholder, filed her cross-bill of complaint, seeking certain relief, including, among other things, the appointment of a successor-trustee under the trust deed being foreclosed, and the vacation of a certain order entered by the court for the appointment of a receiver for said premises. Answers were filed to the cross-bill, and during the pendency of the matter the trustee named in the trust deed voluntarily resigned its office. A decree was then entered appointing Jules G. Eichenbaum as successor-trustee, which decree specifically affirmed the order of court entered on October 22, 1932, and is set forth in this opinion.

A decree of foreclosure was entered on July 15, 1937, finding that Jules G. Eichenbaum was heretofore appointed successor-trustee of the bond issue sought to be foreclosed on the cross-bill of complaint filed by Etta King. The court entered certain other findings which are not material to the issues before this court. However, a further order was entered on July 15, 1937, upon the motion of plaintiff, which is as follows:

> "On motion of Shulman, Shulman and Abrams, attorneys for plaintiff, to vacate the order allowing Isa W. Kahn to remain in possession and to receive 4% of the gross income and to appoint a receiver to operate the premises, or to deliver possession to the plaintiff, as trustee, and that no funds be further paid out of the income of the property for taxes until the disposition of the question of the forfeiture of the lease, or until the further order of the court, and that some money in the possession of Isa W. Kahn and the future income of the property be applied on account of the decree, as per petition presented to the court, and the court having heard oral arguments and being fully advised in the premises:

and provided. The order further authorized him to retain a sum of money equivalent to 5% of the gross revenue from the said premises to defray the cost of managing the same. The bond required by the order was duly filed and approved by the court, and since that time Ian C. Kahn has been in continuous possession of the premises described in said trust deed and has operated and managed the same, pursuant to the order of the court.

On November 1, 1926, Ella King, a bondholder, filed her cross-bill of complaint, seeking certain relief, including, among other things, the appointment of a successor-trustee under the trust deed being foreclosed, and the vacation of a certain order entered by the court for the appointment of a receiver for said premises. Answers were filed to the cross-bill, and during the pendency of the matter the trustee named in the trust deed voluntarily resigned its office. A decree was then entered appointing Jules G. Lichenbaum as successor-trustee, which decree specifically affirmed the order of court entered on October 27, 1925, and is set forth in this opinion.

A decree of foreclosure was entered on July 15, 1927, finding that Jules G. Lichenbaum was heretofore appointed successor-trustee of the bond issue sought to be foreclosed on the cross-bill of complaint filed by Ella King. The court entered certain other findings which are not material to the issues before this court. However, a further order was entered on July 15, 1927, upon the motion of plaintiff, which is as follows:

"On motion of Thomson, Dunham and Abrams, attorneys for plaintiff, to vacate the order allowing Ian C. Kahn to remain in possession and to receive 5% of the gross income and to appoint a receiver to operate the premises, or to deliver possession to the plaintiff, as trustee, and that no funds be further paid out of the income of the property for taxes until the distribution of the position of the territories of the issue, or until the further order of the court, and that some money in the possession of Ian C. Kahn and the future income of the property be applied on account of the decree, as per petition presented to the court, and the court having heard oral arguments and being fully advised in the premises;

It Is Ordered, Adjudged and Decreed:

(1) That the motion to appoint a receiver and to remove Isa W. Kahn from possession be and is hereby denied.

(2) That the motion to disallow the payment of 4% from the gross income to Isa W. Kahn be and same is hereby allowed and sustained, and all previous orders inconsistent with this order be and are hereby modified so that no future payment be allowed to Isa W. Kahn for the management of the property.

(3) That the motion requiring Isa W. Kahn to surrender possession to Jules G. Eichenbaum, as successor-trustee, be and same is hereby denied.

(4) That the motion that no further payments be made on account of taxes and that the order directing the application of the income for the payment of taxes be vacated and such funds be held until the further order of the court, be and same is hereby denied."

The pertinent question in this matter is whether the order appealed from is a final order, determining the issues between the parties. It is to be observed that the order of removal of the owner, Isa W. Kahn, from possession and that a receiver be appointed is not sufficiently final in effect to give this court jurisdiction. It is admitted that the court had authority to permit the owner to remain in possession of the property how in the process of foreclosure, upon the giving of bond. This permission was granted. The order of the court refusing to grant the relief asked for by the plaintiff is not final in its character and such as would justify an appeal. The petition also prayed for the removal of Kahn and the appointment of a receiver. While the statute relating to interlocutory appeals provides for an appeal where a receiver is appointed, it does not provide that an appeal may be taken where the appointment of a receiver is denied by the court. As to whether further payment shall be made upon the taxes, and Kahn be required to return 4% of the gross income which he received from 1932 to 1937, the order is not final in its effect, for the reason that the court by its foreclosure decree retains jurisdiction to require Kahn to account for the moneys received by him as income from the property, as well as for expenditures. The rule is well established that before an appeal will be

It is ordered, adjudged and decreed:

(1) That the motion to appoint a receiver and to remove Ian ". Kahn from possession be and is hereby denied.

(2) That the motion to disallow the payment of $. from the gross income to Ian ". Kahn be and same is hereby allowed and sustained, and all previous orders inconsistent with this order be and are hereby modified so that no future payment be allowed to Ian ". Kahn for the management of the property.

(3) That the motion requiring Ian ". Kahn to surrender possession to Julee ". Kohnhorn, as successor-trustee, be and same is hereby denied.

(4) That the motion that no further payments be made on account of taxes and that the order directing the application of the income for the payment of taxes be vacated and such funds be held until the further order of the court, be and same is hereby denied."

The pertinent question in this matter is whether the order appealed from is a final order, determining the issues between the parties. It is to be observed that the order of removal of the owner, Ian ". Kahn, from possession and that a receiver be appointed is not sufficiently final in effect to give this court jurisdiction. It is admitted that the court had authority to permit the owner to remain in possession of the property may in the process of foreclosure upon the giving of bond. This permission was granted. The order of the court refusing to grant the relief asked for by the plaintiff is not final in its character and even as would justify an appeal. The petition also prayed for the removal of Kahn and the appointment of a receiver. While the statute relating to interlocutory appeals provides for an appeal where a receiver is appointed, it does not provide that an appeal may be taken where the appointment of a receiver is denied by the court. As to whether further payment shall be made upon the taxes, and Kahn be required to return 4% of the gross income which he received from 1927 to 1929, the order is not final in its effect, for the reason that the court by its foreclosure decree retains jurisdiction to require Kahn to account for the money received by him as income from the property, as well as for expenditures. The rule is well established that before an appeal will be

considered by this court the order must be final in its nature, and unless the order is final this court is without jurisdiction to pass upon the questions called to its attention.

For the reasons stated the appeal is dismissed.

APPEAL DISMISSED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

considered by this court the order must be final in its effect, and unless the order is final this court is without jurisdiction to pass upon the questions raised in its attention.

For the reasons stated the appeal is dismissed.

AFFIRMED DISMISSED.

DENIS E. SULLIVAN and HAIL, JJ., concur.

39852

HARRY J. O'ROURKE,

(Complainant and Cross-Defendant)

Appellant,

v.

MARY C. O'ROURKE,

(Defendant and Cross-Complainant)

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

295 I.A. 617

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The appeal in this court is by the complainant and cross-defendant from a decree dismissing his bill for divorce for want of equity and awarding separate maintenance to Mary C. O'Rourke, defendant and cross-complainant, pursuant to the prayer of her cross-bill.

The action was brought upon a bill and cross-bill. The bill for divorce filed by the complainant charged that the defendant had wilfully deserted the complainant without just cause November 5, 1924. The cross-bill for separate maintenance alleged that the complainant (therein designated "cross-defendant") had deserted the defendant October 5, 1929; that the complainant and one Lorraine Meyers were living and cohabiting together as man and wife and had been doing so since prior to October 5, 1929; and that the defendant was at the time of the filing of her cross-bill living separate and apart from her husband without her fault.

The decree was entered after hearings in open court on the bill for divorce, the answer and amended answer thereto of the defendant, the cross-bill and the answer thereto of the complainant, and the evidence introduced before the Chancellor. The decree awarded the defendant $125 per month as permanent alimony for separate maintenance and $2,000 for attorney's fees.

No question is raised as to the sufficiency of the pleadings filed by the several parties.

[illegible]

MARY L. O'BRIEN,

(Complainant and Cross-Defendant)

Appellee,

v.

[illegible]

Appellant.

MARY C. O'BRIEN,

(Defendant and Cross-Complainant)

Appellee.

[illegible] COURT.

MR. PRESIDING JUSTICE DUNNE DELIVERED THE OPINION OF THE COURT:

The appeal in this court is by the complainant and cross-defendant from a decree dismissing his bill for divorce for want of equity and awarding separate maintenance to Mary C. O'Brien, defendant and cross-complainant, pursuant to the prayer of her cross-bill.

The action was brought upon a bill and cross-bill. The bill for divorce filed by the complainant charged that the defendant had wilfully deserted the complainant without just cause December 5, 1924. The cross-bill for separate maintenance alleged that the complainant (herein designated "cross-defendant") had deserted the defendant October 5, 1929; that the complainant and one Lorraine Dwyre were living and cohabiting together as man and wife and had been doing so since prior to October 5, 1929; and that the defendant was in the time of the filing of her cross-bill living separate and apart from her husband without her fault.

The decree was entered after hearing in open court on the bill for divorce, the answer and amended answer thereto of the defendant, the cross-bill and the answer thereto of the complainant, and the evidence introduced before the Chancellor. The decree ordered the defendant $150 per month as permanent alimony for separate maintenance and $3,000 for attorney's fees.

No question is raised as to the sufficiency of the pleadings filed by the several parties.

The complainant's theory is that the defendant had refused to live with him; had forced him out of their home; and had continued in such course for more than two years following November 5, 1924, and that this constituted desertion of him by the defendant.

On the other hand, the answer of the defendant to this theory of the complainant is that the complainant had deserted the defendant on or about October 5, 1929, without just cause, and that the complainant prior to October 5, 1929 and thereafter was living in adultery with one Loraine Meyers, and that the defendant was living separate and apart from him without fault on her part.

The question is one of fact as to whether the evidence sustained the bill for separate maintenance filed by the defendant and justified the court in entering the decree that the defendant live separate and apart from her husband and that she was without fault.

From an examination of the facts as they appear in the record it appears that the difficulty arising between the complainant O'Rourke and the defendant Mrs. O'Rourke was due largely to the association of the complainant with the woman named Loraine Meyers, and our attention has been called to the record by the defendant wherein it appears from the evidence of Mildred E. Wendell that O'Rourke and Loraine Meyers were seen having dinner together at the Berghoff restaurant shortly after November 5, 1924. It also appears from the evidence of Mildred E. Wendell that she saw O'Rourke leaving the entrance to Loraine Meyers' apartment building at midnight in April, 1925, and also that O'Rourke and Loraine Meyers were seen embracing in the latter's apartment in the spring of 1925, and there is the undisputed testimony of the defendant that she saw the complainant leaving Loraine Meyers' apartment building at midnight in April, 1925; saw the lights in the apartment, which had been dim all evening, go out entirely as O'Rourke was coming through the court, the defendant indicating

The complainant's theory is that the defendant had refused to live with him; had forced him out of their home; and had continued in such course for more than two years following December 6, 1924, and that this constituted desertion of him by the defendant.

On the other hand, the answer of the defendant to this theory of the complainant is that the complainant had asserted the defendant as of about October 6, 1922, without just cause, and that the complainant prior to October 6, 1922 and thereafter was living in adultery with one Lorraine Sayers, and that the defendant was living separate and apart from him without fault on her part.

The question in one of fact as to whether the evidence sustained the bill for separate maintenance filed by the defendant and justified the court in entering the decree that the defendant live separate and apart from her husband and that she was without fault.

From an examination of the record as they appear in the record it appears that the difficulty arising between the complainant O'Rourke and the defendant Mrs. O'Rourke was due largely to the association of the complainant with the woman named Lorraine Sayers, and our attention has been called to the record by the defendant where in it appears from the evidence of Mildred E. Tendell that O'Rourke and Lorraine Sayers were seen having dinner together at the Burgholf restaurant shortly after November 6, 1924. It also appears from the evidence of Mildred E. Tendell that she saw O'Rourke leaving the entrance to Lorraine Sayers' apartment building at midnight in April, 1924, and also that O'Rourke and Lorraine Sayers were seen returning in the latter's apartment in the spring of 1922, and there is the uncontradicted testimony of the defendant that she saw the complainant leaving Lorraine Sayers' apartment building at midnight in April, 1922; saw the lights in the apartment, which had been dim all evening, go out entirely as O'Rourke was coming through the court, leaving the defendant

that Loraine Meyers must have been in dishabille in order to have retired so shortly after O'Rourke's departure; saw O'Rourke and Loraine Meyers embracing in the latter's apartment on the West Side some time after May, 1925, and that O'Rourke was then in his shirt sleeves, apparently in surroundings usual and informal, and the fact that O'Rourke lied to Mrs. O'Rourke as to his plans on the day that Mrs. O'Rourke followed him and found Loraine Meyers in his automobile.

The defendant contends that the fact that the complainant pretended to have to go to South Bend on November 5, 1924, may well have been a device to enable him to spend the night with his inamorata, a practice that no doubt flowered into full bloom during the defendant's trip to California.

There is evidence that after leaving the defendant in 1924, the complainant and Loraine Meyers, his secretary, removed their respective residences from the North Side of Chicago to apartments but a block apart on the West Side, and that from March, 1929, down to the date of the trial they lived together in a bungalow on the far South Side of Chicago, where they were alone in the bungalow on the nights when Loraine Meyers' mother was in Indianapolis and elsewhere, and the maid did not live in the home; also evidence that he took Loraine Meyers to the Mayo Hospital and visited her there on several occasions; the fact that his interest in her and hers in him went far beyond any employer and employee relationship. The fact is that the complainant O'Rourke did not deny the specific associations with Loraine Meyers described by Mildred E. Wendell or Mrs. O'Rourke.

These facts would indicate that the complainant was not interested to the extent of wishing to live again with the defendant, Mrs. O'Rourke, as would also the testimony of the witness Frank J. Dowd that he had a conversation with the complainant O'Rourke,

that Lorena Myers must have been in disability in order to have retired so shortly after O'Rourke's departure; and O'Rourke and Lorena Myers embodied in the letter's statement on the left side some time after July, 1922, and that O'Rourke was then in his first sleeves, apparently in successful usual and informal, and the fact that O'Rourke lied to Mrs. O'Rourke as to his place on the day that Mrs. O'Rourke followed him and found Lorena Myers in his automobile.

The defendant concedes that the fact that the complainant pretended to have to go to South Bend on September 2, 1924, may well have been a device to enable him to spend the night with his innamorata, a practice that no doubt flowered into full bloom during the defendant's trip to California.

There is evidence that after leaving the defendant in 1924, the complainant and Lorena Myers, his secretary, received their respective residences from the South Side of Chicago to apartments but a block apart on the West Side, and that from April, 1929, down to the date of the trial they lived together in a bungalow on the far South Side of Chicago, where they were found in the bungalow on the night when Lorena Myers' mother was in Indianapolis and elsewhere, and the maid did not live in the home; also evidence that he took Lorena Myers to the Aqua Festival and visited her there on several occasions; the fact that his interest in her and hers in him was far beyond any employer and employee relationship. The fact is that the complainant O'Rourke did not deny the specific accusations with Lorena Myers described by William H. Cornell on the. O'Rourke.

These facts would indicate that the complainant was not interested to the extent of wishing to live again with the defendant, Mrs. O'Rourke, as would also the testimony of the witness Irene A. Dowd that he had a conversation with the complainant O'Rourke,

representing the defendant, Mrs. O'Rourke as her emissary, in which he tried to effect a reconciliation, and subsequent to the time he made this effort and after October 5, 1929, Dowd again saw his uncle, O'Rourke, at O'Rourke's office and informed him that Mrs. O'Rourke was anxious to live again with her husband, and at that time O'Rourke stated it was impossible because of present and past conditions, from which statement it is clear that he refused to resume marital relations with the defendant, his wife.

The complainant contends that he is entitled to a decree of divorce notwithstanding the facts appearing in the record. He relies upon the fact that on November 5, 1924, the defendant said to her husband that she was through with him, and that she never wanted to see him in the house again; that this was followed the next day by her sending a suitcase full of clothes to him, and by thereafter making statements that she was through with the complainant, and suggests that such acts constituted a desertion of him, unless they were justified by acts on his part giving her cause for divorce. He points to the evidence tending to show that he never offered to take the defendant back to him within two years from November 5, 1924, the date when the defendant is alleged to have said to her husband that she was through with him. There is evidence by the defendant that she offered to become reconciled with her husband; that she said (quoting her own words) "I asked him to get rid of the other woman so he could come back", and also evidence that there was a resumption of marital relations on the occasion of March 31, 1926.

While it is true the complainant contends that the court below was erroneous in finding in its decree that the evidence did not sustain the allegations of his bill for divorce, yet the fact is that the court entered an order dismissing the complainant's bill for divorce for want of equity and entered the decree appealed from.

representing his defendant, Mrs. O'Rourke in her chancery, in which he tried to effect a reconciliation, and endeavored to the time he made this effort and after October 8, 1909, had again see his wife, O'Rourke, at O'Rourke's office and informed him that Mrs. O'Rourke was anxious to live again with her husband, and at that time O'Rourke stated it was impossible because of present and past conditions, from which statement it is clear that he refused to resume marital relations with the defendant, his wife.

The complainant contends that he is entitled to a decree of divorce substantiating the facts appearing in the record. He relies upon the fact that on November 8, 1909, the defendant said to her husband that she was through with him, and that she never wanted to see him in the house again; that this was followed the next day by her sending a suitcase full of clothes to him, and by thereafter making statements that she was through with the complainant, and suggests that such acts constituted a desertion of him, unless they were justified by acts on his part giving her cause for divorce. He points to the evidence tending to show that he never offered to take the defendant back to him within two years from November 8, 1909, the date when the defendant is alleged to have said to her husband that she was through with him. There is evidence by the defendant that she offered to become reconciled with her husband; that she said (quoting her own words) "I wanted him to get rid of the other woman so he could come back", and also evidence that there was a reasonable of marital relations on the occasion of March 31, 1909.

While it is true the complainant contends that the court below was erroneous in finding in its decree that the evidence did not sustain the allegations of his bill for divorce, yet the fact is that the court entered an order dismissing the complainant's bill for divorce for want of equity and entered the decree appealed from.

Although the defendant's testimony is questioned and the complainant contends it was not to be believed, this fact was not for us to pass upon, and we are not prepared to say from the record that the conclusion of the trial court was erroneous.

In closing, we quote the language of the court in the case entitled Jones v. Jones, 124 Ill. App. 201:

> "Men who make such mistakes in marriage as appellant claims to have made cannot easily escape the obligations they have assumed. In certain cases they are relieved by the wife's voluntary flight from home; in others they are able to prove charges which give them a release by divorce; if they are not thus discharged from their obligations they must face them, either by bearing the domestic cross, or providing for their wives a suitable living apart."

The decree is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN, AND HALL, JJ. CONCUR.

Although the defendant's testimony is contradicted and the complainant contends it was not to be believed, this fact was not for us to passupon, but we are not prejudiced to say from the record that the conclusion of the trial court was erroneous.

In closing, we quote the language of the court in the case entitled Jones v. Jones, 174 Ill. App. 391:

> "When the wife sues alleging in defense to complaint claims to have made amount sufficiently meeting the obligations they have assumed. In certain cases they are relieved by the wife's voluntary flight from home; in others they are able to prove charges which give them a release by divorce; if they are not time discharged from their obligations they must face them, either by providing the domestic woman, or providing for their give a suitable living apart."

The decree is affirmed.

DECREE AFFIRMED.

DUNN v. DUNN, 197 Mass. 12, 83 N.E. 1.

39729

GEORGINE WHEATON, a minor by KATHRYN WHEATON, her mother and next friend,	APPEAL FROM
Plaintiff - Appellee,	SUPERIOR COURT
v.	
GOLDBLATT BROS. INC., a corporation,	COOK COUNTY.
Defendant - Appellant.	

295 I.A. 618

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it for the sum of $2,500.00, entered in the Superior Court of Cook County in a suit brought on behalf of Georgine Wheaton, a minor, for personal injuries alleged to have been sustained by the minor through the negligence of the defendant. The trial was by a jury, which returned a verdict against defendant for the sum of $5,000.00. At a hearing on the motion for a new trial, plaintiff entered a remittitur for the sum of $2,500.00, and judgment was then entered for $2,500.00.

Georgine Wheaton, in whose behalf the suit is brought, testified to the effect that on February 22, 1935, she was of the age of 12 years, and was in defendant's Lincoln Avenue store with a Mrs. Slayton and two other women who were shopping; that while standing in the aisle of the store, a stack of cardwood boxes about two feet wide, two feet high and two feet long containing cans of syrup, fell upon her right foot; that after the boxes fell, she could not move until the boxes were removed; that the next day she stayed at home and could hardly walk on her foot, and that she was then taken to a doctor whose name she did not know, and that this doctor recommended that she bathe her foot in an epsom salt solution; that he bandaged her foot and gave her oil of wintergreen to treat it with, and that at that time the foot hurt and was swollen; that the next day the bandage was removed, and that her foot was still swollen and hurt and caused her to limp; that she was afterwards

GEORGIAN DISTILLERY, a plant by PATRICK
MULATON, her mother and next friend,

Plaintiff - Appellee,

v.

GOLDHEART CORP. INC., a corporation,

Defendant - Appellant.

M. JUSTICE PAUL DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it for the sum of $2,000.00, entered in the Superior Court of Cook County in a suit brought on behalf of Georgina Mulaton, a minor, for personal injuries alleged to have been sustained by the minor through the negligence of the defendant. The trial was by a jury, which returned a verdict against defendant for the sum of $5,000.00. At a hearing on the motion for a new trial, plaintiff entered a remittitur for the sum of $2,000.00, and judgment was then entered for $3,000.00.

Georgina Mulaton, in whose behalf the suit is brought, testified to the effect that on February 20, 1950, she was of the age of 12 years, and was in defendant's liquor venue store with a Mrs. Clayton and two other women who were shopping; that while standing in the aisle of the store, a stack of cardboard boxes about two feet wide, two feet high and two feet long containing cans of syrup, fell upon her right foot; that after the boxes fell, she could not move until the boxes were removed; that the next day she stayed at home and could hardly walk on her foot, and that she was then taken to a doctor whose name she did not know, and that this doctor recommended that she bathe her foot in an epsom salt solution; that he bandaged her foot and gave her oil of wintergreen to treat it with, and that at that time the foot hurt and was swollen; that the next day the bandage was removed, and that her foot was still swollen and hurt and caused her to limp; that she was afterwards

referred to another doctor by the defendant, and that she saw this doctor five or six times in a period of two weeks; that the latter doctor caused the witness to walk back and forth across the floor, and that at the end of this time, the swelling had gone down, but that she still suffered pain; that at the end of the third week she saw a Dr. Moxon, and that Dr. Moxon bandaged the foot with adhesive tape; that she saw this doctor eight or nine times either at her home or at his office, and that this doctor took X-rays of her foot, and that the last time she saw this doctor was about two weeks before the trial. The witness stated that prior to the accident she played basketball and baseball and most all of the games played at her school; that she could walk without stumbling; that she never had any trouble with the right foot or ankle before the accident, but that since that time, she does not take part in any sports, basketball, baseball or any other game, and that she is always stumbling and falling. On cross examination, the witness stated that she attended school at the Lincoln School in Schiller Park; that her teacher was a Miss Flood and that she had been in Miss Flood's classroom from September, 1934, before the accident, and in 1935, until the end of the school year; that February 22nd,, the day of the accident, was Washington's birthday and came on a Saturday, and that she was out of school all that day and Sunday and Monday following; that she first saw the doctor to whom she was sent by defendant on February 28th; that prior to the accident, she did some work for a Mrs.Slayton, with whom she lived, dusting around the house and washing dishes and other house work; that she can still do such work, but not steadily; that after the accident, she went shopping with Mrs. Slayton and helped her carry packages; that she told her teacher, Miss Flood, that she had an accident, and that, thereafter she, the witness,

referred to another doctor by the defendant, and that she saw this doctor five or six times in a period of two weeks; that the latter doctor caused the witness to walk back and forth across the floor, and that at the end of this time, the swelling had gone down, but that she still suffered pain; that at the end of the third week she saw a Dr. Moses, and that Dr. Moses bandaged the foot with adhesive tape; that she saw this doctor eight or nine times either at her home or at his office, and that this doctor took X-rays of her foot, and that the last time she saw this doctor was about two weeks before the trial. The witness stated that prior to the accident she played basketball and baseball and made all of the teams played at her school; that she could walk without stumbling; that she never had any trouble with the right foot or ankle before the accident, but that since that time, she does not take part in any sports, basketball, baseball or any other game, and that she is always stumbling and falling. On cross examination, the witness stated that she attended school at the Lincoln School in Brooklyn; that her teacher was a Miss Flood and that she had been in Miss Flood's classroom from September, 1931, before the accident, and in 1930, until the end of the school year; that February 22d, the day of the accident, was Washington's birthday and came on a Saturday, and that she was out of school all that day and Sunday and Monday following; that the first saw the doctor to whom she was sent by defendant on February 25th; that prior to the accident, she did some work for a Mrs. Clayton, with whom she lived, dusting around the house and washing dishes and other light work; that she was still to such work, but not steadily; that after the accident, she went shopping with Mrs. Clayton and helped her carry packages; that she told her teacher, Miss Flood, that she had an accident, and that, therefore, the witness,

was slow and deliberate with her movements, and that this had not occurred prior to the accident; that her classroom was on the second floor, and that she always walked up the stairway to the schoolroom because there were no elevators; that she does not use a cane in walking. Plaintiff also testified that after the accident, she went to school the same as before, except at the times she went to see the doctor. Upon the motion of defendant's counsel, and with the permission of the court, plaintiff removed her shoes and stockings from both of her feet and exhibited them to the court and jury. Plaintiff's testimony was corroborated in most particulars by Mrs. Slayton, to whom she referred and with whom she lived and worked.

Dr. J. A. Moxon, the physician to whom plaintiff referred, testified that he saw the plaintiff on April 5, 1935, at her home, and that he made an examination; that he found the right knee to be abraded and infected; that the abrasion was superficial and apparently came from a recent fall; that there was a tenderness on the dorsal lateral aspect of the right foot, and that there was a definite tendency for the foot to turn inwards when she walked; that the plaintiff walked with a limp; that he strapped her ankle with an adhesive strap, and prescribed hot applications and dressed her knee; that on April 13th following, he took an X-ray of the ankle and that it showed no fracture, no pathology; that the X-ray picture indicated a condition which caused her foot to be in the condition which he had before described; that on February 3, 1937, when he made his last examination, there was a considerable change in the plaintiff's condition, and that he found a definite weakness in her ability to bring her right foot out "as compared to the left foot". He was asked this question by the attorney for plaintiff: "Now, Doctor, have you an opinion based upon a reasonable medical certainty after your examination and study of this case and your treatment of it as to whether it would be

was also the difficulty she had encountered, and that this had had occurred prior to the accident; that her discomfort was on the second floor, and that she always walked up the staircase to the apartments because there was no elevator; that she then put her weight in walking. Plaintiff also testified that after the accident, she went to school the same as before; except at the times she went to see the doctor. Upon the motion of defendant's counsel, and with the permission of the court, plaintiff removed her shoes and stockings from both of her feet and exhibited them to the court and jury. Plaintiff's testimony was corroborated in most particulars by Mrs. Slyfton, to whom she returned and with whom she lived and worked.

Dr. L. A. Young, the physician to whom plaintiff referred, testified that he saw the plaintiff on April 4, 1929, at her home, and that he made an examination; that he found the right knee to be swollen and inflamed; that the patella was painful and apparently came from a recent fall; that there was a tenderness in the lateral aspect of the right knee, and that there was a definite tenderness for the foot to turn inwards when she walked; that the plaintiff walked with a limp; that he strapped her ankle with an adhesive strap, and prescribed hot applications and dressed her knee; that on April 15th following, he took an x-ray of the ankle and that it showed no fracture, no pathology; that the x-ray picture indicated a condition which caused her foot to be in the condition which he had before described; that on February 7, 1927, when he made his last examination, there was a considerable change in the plaintiff's condition, and that he found a definite weakness in her ability to bring her right foot out "as compared to the left foot". He was asked this question by the attorney for plaintiff: "Now,Doctor, have you an opinion based upon a reasonable medical certainty after your examination and study of this case and your treatment as it is to whether it would be

necessary for the plaintiff to continue under medical treatment for this injury?", to which he replied that he had. He was then asked: "What is your opinion?" Answer: "I don't believe so". He testified that a reasonable charge for the services rendered was $45.00.

Other witnesses testified to the fact of the accident happening in defendant's store.

A doctor produced by defendant testified that he saw the plaintiff on February 28, 1935, at his office, and that plaintiff reported that her right foot had been hurt at Goldblatt's; that on the removal of her shoe and stocking he found a slight redness, a discoloration, a slight swelling over the instep, and that "there was a definite spot right over the instep", an area which would cover about one inch; that he examined her to see if there was any fracture and dislocation, any limitation of motion, or any loss of function; that there was no fracture, there was no dislocation, there was no limitation of motion, there was some swelling, which is called a contusion, over the instep; that the witness ordered her to apply compresses, dipped in a solution of hot boric acid or epsom salts, to the swollen area, as this would draw out any inflammation and remove the pain; that this doctor made a second examination on March 8, had plaintiff remove her shoe and stocking, and that he found the inflammation practically gone; that on March 15th he found no redness of the ankle and no swelling. Upon cross examination, this doctor stated that the bones of the plaintiff's foot were in proper position, and that they were in proper alignment; that he tested her for flexion and extension of her foot, and that "she was able to do this in good condition"; that she was able to extend her toes on her foot and flex the foot, which shows that the muscle had not been disturbed, and that there was no limitation of motion. The doctor testified that neither the muscle or tendon had been injured; that he examined her to see

necessary for the plaintiff to continue under medical treatment for this injury?", to which he replied that he had. He was then asked: "What is your opinion?" Answer: "I don't believe so". He testified that a reasonable charge for the services rendered was $45.00.

Other witnesses testified to the fact of the accident happening in defendant's store.

A doctor practicing by examination testified that he saw the plaintiff on February 26, 1934, at his office, and that plaintiff reported that her right foot had been hurt at defendant's; that on the removal of her shoe and stocking he found a slight redness, a discoloration, a slight swelling over the instep, and that "there was a definite spot right over the instep", an area which would cover about one inch; that he examined her to see if there was any fracture and dislocation, any limitation of motion, or any loss of function; that there was no fracture, there was no dislocation, there was no limitation of motion, there was some swelling, which is called a contusion, over the instep; that the witness ordered her to apply compresses, dipped in a solution of hot boric acid or epsom salts, to the swollen area, so this would draw out any inflammation and remove the pain; that this doctor made a second examination on March 3, and plaintiff removed her shoe and stocking, and that he found the inflammation practically gone; that no bruise did he find on persons of the white race and no swelling. Upon cross examination, this doctor stated that the power of the plaintiff's foot were in proper position, and that they were in proper alignment; that he tested her for flexion and extension of her foot, and that "she was able to do this in good condition"; that she was able to extend her toes on her foot and flex the foot, which shows that the muscle had not been disturbed, and that there was no limitation of motion. The doctor testified that neither the muscle or tendon had been injured; that he examined her to say

whether or not there was a fracture and found none, and that he discharged her as cured.

Grace Flood, the school teacher to whom the plaintiff referred, was produced as a witness by the defendant. This witness testified that during all the times mentioned by plaintiff, plaintiff was a pupil of the witness. This witness was asked whether Georgine Wheaton played basketball at any time she was a pupil, and the answer was: "Not to my knowledge, I do not think so". The witness was asked if plaintiff had ever told the witness that she had had an accident, and the answer was, "No". The witness was then asked whether the plaintiff limped around the schoolroom, and the answer was "Not that I noticed". The witness testified that plaintiff always had a slow and deliberate way of walking. The principal of the school which plaintiff attended during the periods mentioned testified that he remembered the plaintiff, and that at the time of the trial, plaintiff was in the eighth grade in the school. At the time of the accident, she was in the sixth grade. He was asked whether or not at the time of the accident, plaintiff took part in basketball games in the gym, and the answer was, "No."

Defendant insists that Georgine Wheaton, at the time in question, was not in defendant's place as an invitee, but that she was a mere licensee, and that there can be no liability on the part of the defendant, unless the injury to plaintiff was shown to have been wilfully and wantonly done, and with this proposition in view, the defendant complains of the following instruction given on behalf of plaintiff:

> "The court instructs the jury that a store owner by inviting the public to his store to purchase goods is charged with the duty of storing his goods in a reasonable safe manner, so that they will not unduly expose to danger children of his customers by being placed so unguarded as to fall upon and injure them."

We cannot agree with defendant's contention nor with the theory of

whether or not there was a fracture and found none, and that he discharged her as cured.

Grace Flood, the school teacher to whom the plaintiff referred, was produced as a witness by the defendant. This witness testified that during all the times mentioned by plaintiff, plaintiff was a pupil of the witness. This witness was asked whether George Weston played basketball at any time she was a pupil, and the answer was: "Not to my knowledge, I do not think so". The witness was asked if plaintiff had ever said the witness that she had an accident, and the answer was, "No". The witness was then asked whether the plaintiff limped around the schoolroom, and the answer was "Not that I noticed". The witness testified that plaintiff always had a slow and deliberate way of walking. The principal of the school also plaintiff attended during the periods mentioned testified that he remembered the plaintiff, and that at the time of the trial, plaintiff was in the 8th grade in the school. At the time of the accident, she was in the sixth grade. He was asked whether or not at the time of the accident, plaintiff had part in waterfall grass in her eye, and the answer was, "No."

Defendant insists that George Weston, at the time in question, was not in defendant's place as an invitee, but that she was a mere licensee, and that there can be no liability on the part of the defendant, unless the injury to plaintiff was shown to have been wilfully and wantonly done, and with this proposition in view, the defendant complains of the following instruction given on behalf of plaintiff:

'The court instructs the jury that a store owner by inviting the public to his store to purchase goods is charged with the duty of storing his goods in a reasonable safe manner, so that they will not unduly expose to danger children of his customers by being placed so unguarded as to fall upon and injure them.'

We cannot agree with defendant's construction nor with the theory of

the instruction. The evidence clearly establishes the fact that the plaintiff was rightfully in defendant's store with Mrs. Slayton, with whom she was living.

In Belcher v. John M. Smyth Co., 343 Ill. App. 65, a child of the age of six years, together with his parents, was in the store of defendant corporation, and was killed when a pile of rolls of linoleum fell upon the child. In holding that defendant was liable, the court made the following comment:

> "It is obvious that the defendant knew that in the sale of its linoleum there would be men, women and children passing along near the standing rolls. The defendant was also bound to know that normal children of tender years might come in contact with the linoleum rolls, and, therefore, it was its duty to see that its goods were so stored and kept that customers and their children, who were rightfully in the store, would not be unduly exposed to danger. In the instant case if the roll fell, as a result of the interference with it by the child, it would still be liable and the instruction was erroneous. The child, being under 7 years, was incapable of any negligence. Maskaliunas v. Chicago & W. I. R. Co., 318 Ill. 42."

See also Reichmann v. Robertson's, Inc., 364 Ill. App. 537, and cases there cited.

Defendant also insists that the verdict is excessive, is against the manifest weight of the evidence, and that the remittitur did not cure it. Whatever the evidence of witnesses produced by either of the parties may show, the fact remains that upon the request of defendant's counsel, plaintiff exhibited her limbs to both the court and jury. What the judge and jury saw, of course, is not in the record. Upon the motion for a new trial, the judge who tried the case agreed with counsel for defendant that the verdict of $5,000.00 was excessive, ordered a remittitur of $2,500.00, and entered judgment for that amount. He was evidently of the opinion from the evidence of the witnesses and his own view of plaintiff's limbs, that this amount was justified. We are not prepared to say, upon the whole record presented to us here, that the court was in error. Therefore, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

the instruction. The evidence strongly substantiates the fact that the plaintiff was negligible in defendant's eyes with Mrs. Harper, with whom she was living.

In Gardner v. Jones, Inc., 347 Ill. App. 39, a child of the age of six years, together with the parents, was in the store of defendant corporation, and was killed when a pile of rails or lumber fell upon the child. In holding that defendant was liable, the court made the following comment:

> "It is obvious that the defendant knew that in the pile of its lumber there would be rows, beams and railings leaning along near the standing rails. The defendant was also bound to know that normal children of tender years might come in contact with the lumber rails, and, therefore, it was its duty to see that its goods were so stored and kept that accidents and their miseries, due some liability in the store, would not be readily exposed to danger. If the lumber over it the rail fell, as a result of the interference with it by the child, it would still be liable and the interposition was extraordinary. The child, being under 7 years, was incapable of any negligence. Greenlaw v. Chicago R. R. Co., 118 Ill. 64."

See also Eckhardt v. Wurtzebach, Inc., 344 Ill. App. 497, and cases there cited.

Defendant also insists that the verdict is excessive, in spite of the manifest weight of the evidence, and that the verdicts did not cure it. Whatever the evidence of witnesses produced by either of the parties may show, the fact remains that upon the payment of defendant's counsel, plaintiff exhibited her limbs to both the court and jury. That the judge and jury was, of course, in no in the record upon the motion for a new trial, the judge who tried the case granted with counsel for defendant that the verdict of $5,000.00 was excessive, ordered a remittitur of $3,000.00, and entered judgment for the remainder. He was evidently of the opinion from the evidence of the witnesses and his own view of plaintiff's limbs, that this amount was justified. We are not impressed by any, even the whole record presented to us here, that the court was in error. Therefore, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Burke, P.J., and Dixon, J., concur.

39750

CLARENCE W. EDINGER, et al.,
Plaintiffs below,

CLARENCE W. EDINGER,
Appellee,

v.

CLARENCE F. EDINGER, et al.,

On Appeal of DOROTHY REALTY AND INVESTMENT COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

295 I.A. 618

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On November 20, 1936, the complainant, Clarence W. Edinger, filed a bill to foreclose a mortgage trust deed on real estate, executed by Clarence F. Edinger and Christine M. Edinger, dated September 17, 1929, which, as alleged, was given to secure the payment of a promissory note of the parties named, of the same date, for $15,000.00, due September 17, 1934. The note was made payable to bearer. The fee to the real estate involved, is held by Clarence F. and Christine Edinger, as joint tenants.

The bill recites that, in addition to the principal note, installments of interest agreed to be paid, were evidenced by ten promissory notes for $450.00 each, payable semi-annually. The trust deed was made to the Chicago Title & Trust Company, as trustee. It is further recited in the bill that on September 17, 1934, the makers of the note and mortgage had failed and refused to pay the installments of interest due thereon, that current taxes for the years 1929 to 1936, levied against the mortgaged premises, had not been paid, and that pursuant to the terms of the trust deed, the plaintiff elected to foreclose. Thereafter on June 11, 1937, the Dorothy Realty and Investment Company, a corporation, which had been made a party defendant to the bill of complaint, filed its answer, in which it denies that the defendants were indebted to the plaintiff or any other

On Appeal of MONTAY TITLE AND
INVESTMENT COMPANY, a corporation,
Appellant,

vs.

CLARENCE S. BINGER, et al.,
Plaintiffs below,
CLARENCE S. BINGER,
Appellee,

CLARENCE S. BINGER, et al.,
Appellees,

vs.

MONTAY TITLE AND INVESTMENT COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT:

On December 28, 1928, the corporation, Clarence S. Binger, filed a bill to foreclose a mortgage issued upon an real estate, executed by Clarence S. Binger and Christine S. Binger, dated September 17, 1923, which, it alleged, was given to secure the payment of a promissory note of the parties named, of the same date, for $15,000.00, due September 17, 1924. The note was made payable to bearer. The lien to the real estate involved, is held by Clarence S. and Christine Binger, as joint tenants.

The bill recites that, in addition to the principal note, installments of interest agreed to be paid, were evidenced by ten promissory notes for $450.00 each, payable semi-annually. The trust deed was made to the Chicago Title & Trust Company, as trustee. It is further recited in the bill that on September 17, 1924, the maker of the note and mortgage had failed and refused to pay the installments of interest due thereon, that current taxes for the years 1923 to 1928, inclusive, against the mortgaged premises, had not been paid, and that pursuant to the terms of the trust deed, the plaintiff elected to foreclose. Thereafter on June 11, 1927, the Montay Title and Investment Company, a corporation, which had been made a party defendant to the bill of complaint, filed its answer, in which it denies that the defendants were indebted to the plaintiff or any other

person in the sum of $15,000.00, at the time the note was executed or at any time, and denies that the note was delivered to evidence and secure any actual indebtedness incurred by the makers of the note. In this answer it is admitted that on September 17, 1929, the date of the note and mortgage, the defendants, Clarence F. Edinger and Christine M. Edinger, executed the documents, but it denies that plaintiff is the legal holder of the note, or that the mortgage trust deed constitutes a valid lien on the real estate described therein, and it is alleged by the Dorothy Realty and Investment Company that the note and mortgage in question were executed by the defendants for the purpose of loaning the same either to the plaintiff, or to a corporation known as Edinger and Sons, Incorporated, for the purpose of using the same as collateral to obtain a loan at the First National Bank of Wilmette, for either Clarence F. Edinger, the plaintiff, or Edinger and Sons, Incorporated; that the note and mortgage were hypothecated with this bank for a loan of $5,000.00, to Edinger and Sons, Inc., which amount was subsequently paid and that the note for $5,000.00 given to the bank, for the payment of which the note and mortgage in question were given as security, was afterward paid and cancelled, that the note and trust deed were thereupon delivered to the defendants, Clarence F. Edinger and Christine M. Edinger, and that thereupon the trust deed ceased to be a lien upon the premises involved. The defendant, the Dorothy Realty and Investment Company, also filed a counter claim, in which it alleged that on October 6, 1936, it obtained a judgment against the two defendants for the sum of $1,436.79, and that by reason of such judgment and the execution issued thereon, the defendant had a prior lien to that of any supposed lien of the mortgage on the premises involved, and prayed that a decree be entered in its favor. In the answer filed by this defendant, it is also alleged that the claim of plaintiff to the note and mortgage in question is

person in the sum of $1,000.00, at the time the note was executed or at any time, and denies that the note was delivered to evidence and secure by actual indebtedness incurred by the maker of the note. In this answer it is admitted that on September 17, 1929, the date of the note and mortgage, the intervenor, Clarence F. Ridgeway and Christine E. Ridgeway, executed the documents, but it denies that plaintiff is the legal holder of the note, or that the mortgage trust deed constitutes a valid lien on the real estate described therein, and it is alleged by the Security Realty and Investment Company that the note and mortgage in question were executed by the defendants for the purpose of loaning the same either to the plaintiff, or to a corporation known as Ridgeway and Sons, Incorporated, for the purpose of using the same as collateral to obtain a loan at the first National Bank of Illinois, for either Clarence F. Ridgeway, the plaintiff, or Ridgeway and Sons, Incorporated; that the note and mortgage were hypothecated with this bank for a loan of $5,000.00, to Ridgeway and Sons, Inc., which amount was subsequently paid and that the note for $5,000.00 given to the bank, for the payment of which the note and mortgage in question were given as security, was otherwise paid and cancelled; that the note and trust deed were thereupon delivered to the defendants, Clarence F. Ridgeway and Christine E. Ridgeway, and that thereupon the trust deed ceased to be a lien upon the premises involved. The defendant, the Security Realty and Investment Company, also filed a counter claim, in which it alleged that on October 8, 1930, it obtained a judgment against the two defendants for the sum of $1,436.70, and that by reason of such judgment and the execution issued thereon, the defendant had a prior lien to that of any supposed lien of the mortgage on the premises involved, and prayed that a decree be entered in its favor. In the answer filed by this defendant, it is also alleged that the claim of plaintiff to the note and mortgage in question is

fraudulent, and that the foreclosure proceeding resulted from a conspiracy between the plaintiff and his father and mother, Clarence F. and Christine M. Edinger, to defeat the claim of the defendant, the Dorothy Realty and Investment Company. Issue was joined on the bill, answer and counter claim, and the matter was referred to a Master in Chancery, who, after hearing evidence, reported and found that the lien of the plaintiff in the foreclosure suit was superior to that of the counter claimant, the Dorothy Realty and Investment Company, and after a hearing on objections and exceptions to the Master's report, a decree was entered by the court confirming the report and ordering the sale of the real estate. It is from this decree that the Dorothy Realty and Investment Company is prosecuting this appeal.

The report of the Master filed in the case finds that the note and trust deed in question were executed and issued for the purpose of authorizing and permitting the plaintiff to use these documents as collateral security for a loan which he, or the corporation of which he was president, might wish to obtain for the use of the corporation, but that commencing in the year 1931, plaintiff began making advancements to the defendants, Clarence F. Edinger and Christine M. Edinger, his wife, which aggregated the sum of approximately $25,000.00; that some time during the year 1933, while the trust deed and notes pledged as aforesaid, were in possession of the First National Bank of Wilmette, the defendant, in consideration of the advancements made to them, and to repay plaintiff for such advancements, conveyed and assigned the said principal note and trust deed and delivered title thereto to plaintiff; that upon the payment of the collateral note, on or about July 5, 1934, the plaintiff came into physical possession of same, and acquired the full and unencumbered legal title, as theretofore conveyed and assigned.

transfers, and that the foreclosure proceeding resulted from a conspiracy between the plaintiff and the trustee and mortgagee, Clarence F. and Christine K. Ridger, to defeat the claim of the defendant, the Dorothy Realty and Investment Company. Issue was joined on the bill, answer and counter claim, and the matter was referred to a master in chancery, who, after hearing evidence, reported and found that the lien of the plaintiff in the foreclosure suit was superior to that of the counter claimant, the Dorothy Realty and Investment Company, and after a hearing on objections and exceptions to the master's report, a decree was entered by the court confirming the report and ordering the sale of the real estate. It is from this decree that the Dorothy Realty and Investment Company is prosecuting this appeal.

The record of the master filed in the case finds that the note and trust deed in question were executed and issued for the purpose of authorizing and permitting the plaintiff to use these documents as collateral security for a loan which he, or the corporation of which he was president, might plan to obtain for the use of the corporation, but that commencing in the year 1931, plaintiff began making advancements to the defendants, Clarence F. Ridger and Christine K. Ridger, his wife, which aggregated the sum of approximately $18,000.00; that some time during the year 1933, while the trust deed and note pledged as aforesaid, were in possession of the first National Bank of Illinois, the defendants, in consideration of the advancements made to them, and to repay plaintiff for such advancements, conveyed and assigned the said original note and trust deed and delivered title thereto to plaintiff; that upon the payment of the collateral note, on or about July 3, 1934, the plaintiff came into physical possession of same, and completed the full and unencumbered legal title, as trustee, conveyed and assigned.

Plaintiff appeared before the master as a witness in his own behalf, and on cross examination, testified to the effect that he did not have possession of this note and trust deed in 1933, but that they were in the possession of the corporation mentioned, but that "it was put into my possession in 1933 for moneys I had advanced them and moneys I would advance them", presumably meaning moneys advanced and to be advanced to his father and mother; that the moneys he advanced, as aforesaid, were through his corporation; that at the time of the filing of the suit, his father was secretary of this corporation and continued so to act until April, 1936; that he got the note from his father in 1933, and that at that time, the note was the property of his father, and that at the time the documents were delivered as collateral, they were in the office of Edinger and Sons, Incorporated; that the note and mortgage had been pledged as collateral "for any purpose that the corporation might need it." He further testified to the effect that at the time the note and mortgage were executed, insofar as he was aware, his parents were not indebted to anybody, and that any advances he had made to his father, were made after the execution of the note and mortgage; that the note and mortgage, when not deposited with the bank, were in the depositary of the corporation, that they nevertheless were not delivered to him until 1933; that neither of his parents had ever paid any interest on the note, and that he never demanded any interest from them, that his advancements to his parents were for personal expenses, and that the total of his advancements to them approximated $25,000.00. He also testified to the effect that at the time of the organization of the corporation, his father had paid into the corporation the value of $19,000.00 in property, for which his father received 190 shares of capital stock, and that he, the witness, had become the sole owner of this stock, part of which was transferred to him about July, 1939, for which he paid Clarence F. Edinger and

plaintiff appeared before the master as a witness in his own behalf, and an oral examination, specifies in the effort that he did not have possession of this note (the latest dated in 1920), but that they were in the possession of the corporation mentioned, but that "it was put into my possession in 1921 for money I had advanced them and money I would advance them", presumably meaning money advanced and to be advanced by his father and mother; that the money he advanced, as aforesaid, came through his correspondent; that at the time of the filing of the suit, his father was secretary of this corporation and continued so to act until April, 1922; that he got the note from his father in 1921, and that at that time, the note was the property of his father, and that at the time the documents were delivered as collateral, they were in the office of Ringer and Sons, Incorporated; that the note and mortgage had been pledged as collateral for any purpose that the corporation might need it." He further testified to the effect that at the time the note and mortgage were executed, Ingerer as he was sworn, his mother was not indebted to anybody, and that any advances he had made to his father, were made after the execution of the note and mortgage; that the note and mortgage, when not issuing with the bank, were in the depository of the association, that they nevertheless were not delivered to him until 1922; that neither of his parents had ever paid any interest on the note, and that he never demanded any interest from them; that his advancements to his parents were for personal expenses, and that the total of his advancements by them approximated $40,000.00. He also testified to the effect that at the time of organization of the corporation, his father had paid into the corporation the value of $18,000.00 in property, for which his father received 180 shares of capital stock, and that he, the witness, had bought the sole owner of this stock, part of which was transferred to him about July, 1920, for which he paid Clarence I. Ringer and

Christine M. Edinger with checks of the corporation, and that he, the witness, felt himself to be the entire corporation. He further testified to the effect that all of the advancements made to his father and mother were made by corporation checks, or cash, and that all are shown on the books of the corporation. Plaintiff produced the ledger accounts of Edinger and Sons, Incorporated, and testified that "they constitute the true ledger accounts of the corporation, *** these documents are correct." Defendant thereupon offered in evidence a sheet of the ledger account, which indicates that the note and mortgage in question, on the first day of January, 1935, were carried as an asset of the corporation. Upon the objection of plaintiff's counsel, the master refused to admit this document in evidence, and would not permit counsel for the defendant, the Dorothy Realty Company, to examine plaintiff, the president of the corporation, concerning this item.

It also appears clearly from the record and plaintiff admits that the advances which plaintiff claims to have been made to his parents, and for which they are supposed to have transferred the title to the note and mortgage in question to plaintiff as security, were not made by the plaintiff at all, but were made by the corporation, and while plaintiff claims to be in entire control of the corporation, there is nothing in the record other than his statement, to show that this is a fact. Also, it is not clearly shown that at the time this foreclosure proceeding was instituted, the plaintiff was the owner of the note and mortgage in question. Plaintiff testified that prior to any of the occurrences herein related, he had purchased from his father the stock his father owned in the corporation, that he paid him $9,600.00 for it at the rate of "around $500.00 a month"; that in 1933, after plaintiff had paid up the entire sum of $9,600.00, "I had a conversation about the purchase of the note in question"; that the "note was to be purchased at its face price, that I was to pay

Dealing in Kinsey with checks of the corporation, and that he, the witness, felt himself to be the entire corporation. He further testified to the effect that all of the advancements made to his father and mother were made by corporation checks, or cash, and that all are shown on the books of the corporation. Plaintiff produces the ledger accounts of Edgar and Rose, introduced, and testified that "they constitute the true ledger accounts of the corporation, and these documents are correct." Defendant thereupon offered in evidence a sheet of the ledger account, which indicates that the note and mortgage in question, on the first day of January, 1922, were carried as an asset of the corporation. Upon the objection of plaintiff's counsel, the matter refused to admit this document in evidence, and would not permit counsel for the defendant, the worthy Emily Dempsey, to examine plaintiff, the president of the corporation, concerning this item.

It also appears admitted from the record and plaintiff admits that the advances which plaintiff claims to have been made to his parents, and for which they are supposed to have transferred the title to the note and mortgage in question to plaintiff as security, were not made by the plaintiff at all, but were made by the corporation, and while plaintiff claims to be in entire control of the corporation, there is nothing in the record other than his statement, to show that this is a fact. Also, it is not clearly shown that at the time this transaction proceeding was instituted, the plaintiff was the owner of the note and mortgage in question. Plaintiff testified that prior to any of the conversations herein recited, he had purchased from his father the stock via father owned in the corporation, that he paid him $7,000.00 for it at the rate of "about $200.00 a month"; that in 1920, after plaintiff had paid on the entire sum of $8,000.00, "I had a conversation about the purchase of the note in question"; that the "note was to be purchased at its face value, that I was to pay

the $15,000.00 as I had in the past since 1931, in monthly payments of various sums which they needed, which I have done. The entire $15,000.00 has been paid and more." He further testified to the effect that his father and mother had not been in possession of the note since July 5, 1934, and that all payments since 1933 made to his father were applied on the purchase of stock and the note. There is nothing in the record to indicate a transfer of the title to the note and mortgage in question to plaintiff by either the corporation or plaintiff's parents, who, as stated, own the property as joint tenants, and who were joint makers of the note and mortgage. Plaintiff merely states that they came into his possession in 1933. They had been in his possession, as president of the corporation, from the date of their execution.

In view of all of the circumstances surrounding this case, we are of the opinion that the burden was upon the plaintiff to clearly establish the fact as to the alleged payments made to his father and mother, in consideration for which he claims they assigned the note and mortgage to him, and of the further fact, if it is a fact, that the title to the note and mortgage was assigned to him. We are unable to agree with the trial court that plaintiff has established his ownership of these documents, as alleged, and we are, therefore, of the opinion that the decree should be, and it is reversed and the cause is remanded for a further hearing.

REVERSED AND REMANDED FOR A HEARING.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

the $25,000.00 as I had in the past since 1923, in monthly payments of various sums which they remarked, which I have done. The entire $25,000.00 has been paid and more." He further testified to the effect that his father and mother had met been in possession of the note since July 6, 1924, and that his payments since 1923 made to his father were applied on the interest of about and the note. There is nothing in the record to indicate a transfer of the title to the note and mortgage in question to plaintiff by either the corporation or plaintiff's testate, who, as stated, was the property as joint tenants, and who were joint makers of the note and mortgage. Plaintiff merely states that they came into his possession in 1923. They had been in his possession, as president of the corporation, from the date of their execution.

In view of all of the circumstances surrounding this case, we are of the opinion that the burden was upon the plaintiff to clearly establish the fact as to the alleged payments made to his father and mother, in consideration for which he claims they assigned the note and mortgage to him, and of the further fact, if it is a fact, that the title to the note and mortgage was assigned to him. We are unable to agree with the trial court that plaintiff has established his ownership of them documents, as alleged, and we are, therefore, of the opinion that the decree should be, and it is reversed and the cause is remanded for a further hearing.

REVERSED AND REMANDED FOR A HEARING.

DENIS, P.J., AND DUFFY, J., CONCURS, J. DUFFY.

39765

MARY C. NOLAN,

Appellee,

v.

ROBERT J. KOEPPE,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

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295 I.A. 618

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against him for the sum of $13,500.00, entered in the Circuit Court of Cook County, upon the verdict of a jury.

In the complaint filed by plaintiff it is alleged that the defendant, on May 1, 1931, was indebted to the plaintiff in the sum of $14,500.00 for money had and received to and for the use of the plaintiff; for money due and owing upon an account stated; for money lent by the plaintiff to the defendant; for money laid out and expended by the plaintiff to and for the use of the defendant, and for interest upon and for the forbearance of divers sums of money before then lent and advanced by the plaintiff to the defendant at his request, and by the plaintiff forborne to the defendant for divers spaces of time at the request of the defendant; that being so indebted the defendant on said date and also on May 19, 1931, January 30, 1932, June 9, 1932, and other dates subsequent thereto, promised to pay such indebtedness with interest therein at 6% per annum; that demand was made by the plaintiff for payment of such indebtedness, but that no payment was made except a payment of $150.00 on May 30, 1931.

In a bill of particulars filed by complainant on May 25, 1936, it is stated, among other things, that on November 15, 1937, plaintiff was induced by the defendant, who at that time was president and managing director of a corporation known as Koeppe, Langston, Loper & Company, and other persons to deliver to this corporation, then

IN THE

MARY C. WELLS,

Appellee,

v.

ROBERT L. BROWN,

Appellant.

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engaged in the brokerage business in the city of Chicago, the sum of $15,000.00; that this sum was turned over to the corporation by the plaintiff upon the promise of the defendant that the amount mentioned would be returned to her upon demand, together with interest at 6% per annum to be paid semi-annually; that on October 9, 1929, plaintiff requested the return of the sum named, and that the defendant agreed to return the money with interest; that thereafter plaintiff requested the defendant to purchase for her at the market price 300 shares of common stock of Cities Service Corporation, to be paid for with the money mentioned, and that thereafter on October 19, 1929, plaintiff was notified by the defendant that on October 9, 1929, 200 shares of Cities Service Corporation stock had been purchased for her for the sum of $13,000.00, but that defendant refused and failed to deliver the stock to plaintiff; that during the year 1930, plaintiff made complaint to the State's Attorney of Cook County concerning the defendant's action in the matter, and that thereafter on May 1, 1931, defendant agreed with plaintiff that defendant was indebted to her in the sum of $15,000.00, and that he then agreed to pay her the amount mentioned.

Plaintiff's testimony is to the effect that in 1927 she purchased from a person named McBurney two bonds, one for the sum of $10,000.00 and the other for $5,000.00; that at this time McBurney was employed by a brokerage firm named Wilsey & Company, by which firm plaintiff was also then employed, and that subsequently McBurney was employed by Koeppe, Langston, Loper & Company; that McBurney induced plaintiff to allow him, McBurney, to turn over these bonds to Koeppe, Langston, Loper & Company upon the promise that she would receive 6-1/2% interest upon the amount represented by the bonds from this last mentioned company; that "they", evidently meaning, Koeppe, Langston, Loper & Company, paid the interest until the Fall of 1929; that in the Fall of 1929, plaintiff requested her brother to have

employed in the brokerage business in the city of Chicago, the sum of $12,000.00; that this sum was turned over to the corporation by the plaintiff upon the promise of the defendant that the amount mentioned would be returned to her upon demand, together with interest at 6% per annum to be paid semi-annually; that on October 2, 1922, plaintiff terminated the affairs of the sub rosa, and that the defendant agreed to return the money with interest; that thereafter plaintiff requested the defendant to remit the sum at the rate of one 500 shares of common stock of Illinois Service Corporation, to be paid for with the money mentioned, and that thereafter on October 18, 1929, plaintiff was notified by the defendant that on October 1, 1929, 500 shares of Illinois Service Corporation stock had been purchased for her for the sum of $12,000.00, but that defendant refused and failed to deliver the stock to plaintiff; that during the year 1930, plaintiff made demands on the defendant's attorney of such Monday morning concerning the defendant's action in the matter, and that thereafter in May 1, 1931, defendant agreed with plaintiff that defendant was indebted to her in the sum of $12,000.00, and that he then agreed to pay her the usual contract.

Plaintiff's testimony is to the effect that in 1927 she purchased from a certain bond company two bonds, one for the sum of $10,000.00 and the other for $2,000.00; that at this time Sonnenby was employed by a brokerage firm named Olney & Company, by which firm plaintiff was also then employed, and that subsequently Sonnenby was employed by Cooper, Langston, Joyce & Company; that Sonnenby induced plaintiff to alter his, Sonnenby, to turn over these bonds to Langston, Langston, Joyce & Company upon the promise that he would receive 8-1/2% interest from the amount represented by the bonds from this last mentioned company; that "they", evidently meaning Cooper, Langston, Joyce & Company, paid the interest until the fall of 1929; that in the fall of 1929, plaintiff requested her brother to have

"them" - evidently meaning this brokerage firm - put her money into Cities Service stock, and that her brother told a Mr. Loper, who was connected with this institution, of his sister's request, and that "they wrote me that they had purchased it. They never sent me the stock. They sent me a statement". The statement plaintiff refers to is as follows:

"Confirmation
KOEPPE, LANGSTON, LOPER & CO.
39 South LaSalle Street
Randolph 0380

Chicago, October 19, 1929

SOLD to Mrs. Mary C. Nolan,
Address 2617 Fulton Street,
Toledo, Ohio

Amount	Description		
200	Cities Service Common	@65	$13,000.00

Delivery Instructions
Trade as of October 9th.

KOEPPE, LANGSTON, LOPER & CO.
ByRJK"

It is admitted by defendant that the signature of the corporation to this document was made by him, and that the initials "R.J.K." are his initials. It appears that at this time, plaintiff was residing in Toledo, Ohio, and she testified to the further effect that after she had received from this firm the document above referred to, she and her brother came on to Chicago; that she visited the office of the corporation and there told Loper that she either wanted the Cities Service stock, or her money, and that Loper agreed to send plaintiff the money which she had advanced to this corporation. After this statement, and in the presence of the jury, plaintiff's counsel asked plaintiff this question: "After that, when was the next time you heard from Mr. Koeppe?" Objection was made to this question upon the suggestion of defendant's counsel that up to this time there was nothing in the record to indicate that the witness had ever had any conversation with the defendant Koeppe. The court overruled the objection, and the witness replied: "He called me up over the long distance in January, 1930." Then this question was asked of the

"them" - evidently meaning this worthless firm - put her money into Cities Service stock, and that her brother told a Mr. Lapp, who was connected with this institution, of his sister's request, and that "they wrote me that they had purchased it. They never sent me the stock. They sent me a statement". The statement plaintiff refers to is as follows:

"Certification
Lapp, Hartford, Lapp & Co.
40 South Dudley Street
Kendalph 0980
Chicago, October 19, 1929

Mrs. to Mrs. Mary O. Nolan,
Address 917 Dalton Street,
Toledo, Ohio

Amount	Description		
50	Cities Service common	48	2,400.00

Delivery Instructions
Trade on of October 8th.
Lapp, Hartford, Lapp & Co.
By J.H."

It is admitted by defendant that the signature of the correspondent to this document was made by him, and that the inst.is "J.H." are his initials. It appears that at this time, plaintiff was residing in Toledo, Ohio, and she testified to the further effect that after she had received from this firm the document above referred to, she had her brother come on to Chicago; that she visited the office of the corporation and there told Lapp that she either wanted the Cities Service stock, or her money, and that Lapp agreed to send plaintiff the money which she had advanced to this corporation. After this evidence, and in the presence of the jury, plaintiff's counsel asked plaintiff this question: "After that, when was the next time you heard from Mr. Lapp?" Objection was made to this question upon the suggestion of defendant's counsel that up to this time there was nothing in the record to indicate that the witness had ever had any conversation with the defendant Lapp. The court overruled the objection, and the witness replied: "He called me up over the long distance in January, 1930." Then this question was asked of the

witness by her counsel: "You got a long distance call from where in January, 1930?" Answer: "From Chicago". Question: "And when you picked up the receiver who did you hear, any voice?" She testified that the voice said: "This is Mr. Koeppe speaking". Objection was made, but the court overruled the objection. Then the following question was put: "Now, did you subsequently get to know Mr. Koeppe's voice?" Objection was made to this question and overruled. Answer: "Well, I knew it was he from what he said. He said we are liquidating and will not be able to send you Cities Service, the best thing we have to send you is Charter Coal Company". A motion was made to strike this answer, which was overruled. This witness further testified that she thought that she had talked with Mr. Koeppe over the long distance telephone two or three different times, but that she never saw him "personally" until afterwards, when she met him in the office of a lawyer named Finnegan in the city of Chicago. She was then asked whether or not she recognized Koeppe's voice over the telephone, and she answered: "I imagine, yes." Her whole testimony on this question is to the effect that the voice she heard over the telephone in November, 1930, she recognized as that of the voice of Koeppe from the fact that she afterwards met him and heard him talk in the city of Chicago.

Thomas J. Finnegan, an attorney-at-law to whom plaintiff refers in her testimony, was produced as a witness by plaintiff, and his testimony is to the effect that beginning with December, 1930, or January, 1931, he had frequent interviews with the defendant, both in the presence of the plaintiff and with the defendant alone, in which he, the witness, threatened to have the defendant prosecuted under the Blue Sky Laws if he did not settle with the plaintiff; that defendant frequently promised to settle plaintiff's claim at the rate of $150.00 a month, and it is in evidence that defendant did acknowledge

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witness by her counsel: "Yes, for a long distance call from there in January, 1940?" Answer: "From Chicago". Question: "Did you talk to the receiver who did you hear, any voice?" The testimony that the voice said: "This is Mr. George speaking". Objection was made, but the court overruled the objection. Then the following question was put: "Now, did you subsequently get to know Mr. George's voice?" Objection was made to this question and overruled. Answer: "Well, I knew it was he from what he said. He said he was listening and will not be able to send you little larvae, the last thing we have to send you is Charter Oak Country". A motion was made to strike this answer, which was overruled. This witness further testified that she thought that she had talked with Mr. George over the long distance telephone ten or three different times, but that she never saw him "personally" until afterwards, when she met him in the office of a lawyer named Finnegan in the city of Chicago. She was then asked whether or not she recognized George's voice over the telephone, and she answered: "I believe, yes." Her whole testimony on this question is to the effect that the voice she heard over the telephone in November, 1940, she recognized as that of the voice of George from the first that she afterwards met him and heard him talk in the city of Chicago.

Teresa L. Finnegan, an attorney-at-law to whom plaintiff refers in her testimony, was produced as a witness by plaintiff, and his testimony is to the effect that beginning with December, 1940, or January, 1941, he had frequent interviews with the defendant, both in the presence of the plaintiff and with the defendant alone, in which he, the witness, terrorized to have the defendant reconsider the time by which he did not settle with the plaintiff; that defendant frequently promised to settle plaintiff's claim at the rate of $150.00 a month, and it is in evidence that defendant did actually

his moral and legal liability to pay plaintiff, and did, about May 30, 1931, send plaintiff one check for $150.00.

Defendant testified that he had knowledge of the fact the bonds were turned over to Koeppe, Langston, Loper & Company, were mailed to McBurney, received by McBurney and turned over to Mr. Loper, treasurer of the corporation; that neither at that time, nor any other time prior thereto, did he have any conversation with the plaintiff, and that he had no recollection of ever having seen her except in court; that he may have called her at Toledo over the long distance telephone in 1932 after she had written certain letters to the defendant, but that he had no conversation with her over the telephone in 1930, that he never had any conversation with her regarding any Charter Coal Company stock, and that he did not send the certificate of the Charter Coal stock to her. The record indicates that this Charter Coal stock was sent to the plaintiff by R. P. Loper, an employee of the Koeppe firm, and was worthless. It is further shown that the corporation, of which defendant was an officer, ceased doing business in 1929, and that its business and property, including title to all the collateral stocks and bonds which it had on hand or which were deposited as security for loans, were turned over to the creditors of this corporation. Defendant testified that he acknowledged a moral responsiblity for the plaintiff's claim against the company, but denied that he had ever admitted that he was legally liable to pay the debt.

It is urged by the defendant that the alleged verbal promise of the defendant to pay the debt of the corporation is unenforceable under the Statute of Frauds; also, that the promise, if made, was without consideration, and that the evidence of telephone conversations is inadmissible unless the identity of the parties to the conversations is established.

bis moral and legal liability to pay plaintiff, the $10, about July 20, 1871, when plaintiff was owed for $100.00.

Defendant testified that he had knowledge of the fact the bonds were turned over to Lexington, Lafayette County, were sold to Bolcomby, received by Bolcomby and turned over to Mr. Leper, treasurer of the corporation; that neither at that time, nor any other time prior thereto, did he have any conversation with the plaintiff, and that he had no recollection of ever having seen her except in court; that he may have called her on a phone over the long distance telephone in 1924 after she had written matters letters to the defendant, but that he had no conversations with her over the telephone in 1920, that he never had any conversation with her regarding any Chester Coal Company stock, and that he did not send the certificate of the Chester Coal stock to her. The record indicates that this letter that plaintiff was sent to the plaintiff by A. L. Leper, an employee of the Langley firm, and was worthless. It is further shown that the corporation, of which defendant was an officer, ceased doing business in 1920, and that its business and property, including title to all the mineral stocks and bonds which it had on hand or which were hypothecated as security for loans, were turned over to the creditors of this corporation. Defendant testified that he acknowledged a moral responsibility for the plaintiff's claim against the company, but denied that he had ever admitted that he was legally liable to pay the debt.

It is urged by the defendant that the alleged verbal promise of the defendant to pay the debt of the corporation is unenforceable under the Statute of Frauds; also, that the promise, if made, was without consideration, and that the evidence of telephone conversations is inadmissible unless the identity of the parties to the conversation is established.

Plaintiff insists that defendant's liability is not affected by the Statute of Frauds because the debt in question was his personal debt as well as that of the corporation; that the defendant is liable to pay plaintiff aside from any promise he might have made to pay the debt of the corporation; that plaintiff has the right to sue defendant either in tort or in assumpsit, and that defendant's promise to pay is supported by a good and valid consideration.

It is to be noted that in her claim filed, plaintiff's case is based entirely upon two propositions. One is that the debt was originally that of defendant, and the other is that there was an agreement on the part of the defendant to reimburse her for moneys which the record shows was primarily due and owing from the corporation. It is also to be noted that, insofar as the record indicates, the first time that defendant personally entered the scene was when the confirmation order for the purchase of the Cities Service stocks were sent to plaintiff. Counsel for plaintiff do not take issue with the proposition that under the Statute of Frauds there is no liability on the part of a third person to pay the debt of another, except the promise to pay be in writing and for a sufficient consideration. She urges, however, that an agreement was entered into between the parties in the office of the lawyer Finnegan, by which defendant is bound. Apparently, the only consideration for this agreement, if made, was a tacit agreement on the part of the plaintiff or her attorney not to prosecute defendant for a violation of the "Blue Sky Laws."

Here, it is also claimed that there was a tortious conversation by defendant of plaintiff's property, and that plaintiff can waive the alleged tort and sue in contract. From plaintiff's brief, we gather that the alleged tort consisted in the failure by defendant to deliver the Cities Service stock, which the "confirmation" indicated had been purchased for her by the corporation.

In Howard v. Swift, 356 Ill. 80, a claim was filed in the

Plaintiff insists that defendant's liability is not affected by the defense of frauds because his debt is question was his personal debt as well as that of the corporation; that the defendant is liable to pay plaintiff cash from any promise he might have made to pay the debt of the corporation; that plaintiff has the right to sue defendant either in tort or in assumpsit, and that defendant's promise to pay is supported by a good and valid consideration.

It is to be noted that in her claim filed, plaintiff's case is based entirely upon two propositions. One is that the debt was originally that of defendant, and the other is that there was an agreement on the part of the directors to reimburse her for money which the record shows was primarily due and owing from the corporation. It is also to be noted that, insofar as the record indicates, the first time that defendant personally entered the scene was when the conflagration order for the purchase of the Gibbs Service stocks were sent to plaintiff. Beyond for plaintiff to not take issue with the proposition that under the Statute of Frauds there is no liability on the part of a third person to pay the debt of another, except the promise to pay be in writing and for a sufficient consideration. The courts, however, that an agreement was entered into between the parties in the office of the lawyer Flanagan, by which defendant is bound. Apparently, the only consideration for this agreement, if made, was a tacit agreement on the part of the plaintiff or her attorney not to prosecute defendant for a violation of the "blue sky laws."

Here, it is also claimed that there was a tortious conversation by defendant of plaintiff's property, and that plaintiff can waive the alleged tort and sue in contract. From plaintiff's brief, we gather that the alleged tort consisted in the failure by defendant to deliver the Gibbs Service stock, which the "conflagration" indicated had been purchased for her by the corporation.

In Durand v. Smith, 326 Ill. 80, a claim was filed in the

Probate Court of Cook County against the estate of Edward F. Swift, which charged the purchase of stock of the Corporation Securities Company of which Swift was a director, for the fraudulent and unlawful purpose of creating and maintaining a false and fictitious market value on the capital stock of the company; the purchase of stock of the Middle West Utilities Company by the Corporation Securities Company for the fraudulent and unlawful purpose of creating and maintaining a false and fictitious value of the capital stock of the Middle West Utilities Company; the unlawful exchange of valuable stocks by the Securities Company for stocks of the Insull Utilities Company of no value, and for other alleged unlawful dealing. In that case there was no showing that Swift profited by any of the transactions, and it was held that although the claimant might waive the tort and sue in contract, he could only do so in case of the "enrichment of the tort feasor emanating from the tort committed by him".

Plaintiff cites the case of Donovan v. Purtell, 216 Ill. 629, as sustaining her position. In that case, the defendant was in control of a number of corporations engaged in the real estate business, and the owner of a note and mortgage for $1,200.00 had turned them over to the defendant for collection and reinvestment. The defendant cashed the note and appropriated the money to his own use, and for that reason alone, the Supreme Court sustained a judgment against him. This case is in no sense parallel to the case at bar.

In the instant case, the undisputed testimony is to the effect that plaintiff voluntarily loaned her bonds to the corporation, and insofar as it appears from the record, defendant at that time had nothing to do with the transaction. Plaintiff had been an associate with McBurney, through whom the deal was made, in another brokerage office, and the record shows clearly that this deal was made through a man named Loper of the defendant company. Upon the record as it

Probate Court of Cook County against the estate of Edward S. Dalitz, which charged the promoters of stock of the Corporation securities Company of Illinois, with was a director, for the fraudulent and unlawful purpose of creating and maintaining a false and fictitious market value to the capital stock of the company; the purchase of stock of the middle West Utilities Company by the Corporation Securities Company for the fraudulent and unlawful purpose of creating and maintaining a false and fictitious value of the capital stock of the middle West Utilities Company; the unlawful exchange of valuable stocks by the Securities Company for stocks of the Lowell Utilities Company of no value, and for other alleged unlawful dealing. In that case there was no evidence that Dalitz profited by any of the transactions, and it was held that although the statute might make the fact did was in contract, he could only be in case of the "enrichment of the tort feasor emanating from the tort committed by him".

Plaintiff cited the case of Bagwell v. Dwyer, 324 Ill. 629, as modifying her position. In that case, the defendant was in control of a number of corporations engaged in the real estate business, and the owner of a note and mortgage for $1,500.00 had turned them over to the defendant for collection and reinvestment. The defendant cashed the note and appropriated the money to his own use, and for that reason alone, the Supreme Court sustained a judgment against him. This case is in no sense parallel to the case at bar.

In the instant case, the undisputed testimony is to the effect that plaintiff voluntarily loaned her bonds to the corporation, and longer as it appears from the record, defendant at that time had nothing to do with the transaction. Plaintiff had been on speaking with defendant, through whom the bond was made, in another brokerage office, and the record more clearly that this deal was made through a man named Lopez at the defendant company. Upon the record as it

stands, we can arrive at no other conclusion than that it fails to establish a liability on the part of Koeppe. The judgment of the Circuit Court of Cook County is, therefore, reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

stands, we can arrive at no other conclusion than that it fails to establish a liability on the part of Lessee. The judgment of the circuit court of Cook County is, therefore, reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

KERN, P.J., and DOUGLAS, and LEWIS, J., concur.

39788

In the Matter of THE ESTATE OF W. E. RHODES, Deceased,

ALICE W. SCHAEFER,

(Claimant) Appellant,

v.

MARTIN J. O'BRIEN, Administrator de bonis non of the Estate of W. E. RHODES, Deceased,

(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

295 I.A. 618

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Claimant appeals from a judgment of the Circuit Court of Cook County disallowing her claim for the sum of $3,105.00 against the estate of W. E. Rhodes, deceased. A hearing on the claim was had in the Circuit Court on appeal from the Probate Court, where it had there been disallowed. The claim consists of various items of salary alleged to be due claimant from the Willard Company, in which company the claimant and the decedent were partners, the partnership beginning with January, 1931, and ending October, 1935.

Attached to and made a part of the claim filed in the Probate Court, is a letter from the decedent to the claimant dated October 25, 1935, which is as follows:

"Dear Alice:

I hereby give you my half interest in the Willard Co. without obligation or debt, this interest to date from Oct. 25 and any and all debt up to that time to be assumed by the undersigned and I am to have all collections outstanding as to date.

Yours Sincerely,

(Signed) W. E. Rhodes"

The account books of this partnership were introduced in evidence, and from these it appears that in January, 1931, under a heading entitled "Record of Purchases", an entry of the words "A. W. Schaefer, Chemist, $50.00" was made; also, that a similar entry was made each month in these books under the same heading

In the matter of THE ESTATE OF E. E. [illegible], Deceased,

LLYOD E. [illegible],

(Claimant) Appellee,

v.

MARTIN J. O'NEILL, Administrator de bonis non of the Estate of E. E. [illegible], Deceased,

(Defendant) Appellee.

Appeal from

Circuit Court

Cook County.

Mr. JUSTICE [illegible] delivered the opinion of the court.

Claimant appeals from a judgment of the Circuit Court of Cook County disallowing her claim for the sum of $1,105.00 against the estate of E. E. [illegible], deceased. A hearing on the claim was had in the Circuit Court on appeal from the Probate Court, where it had there been disallowed. The claim consists of various items of salary alleged to be due claimant from the Hilliard Company, in which company the claimant and the decedent were partners, the partnership beginning with January, 1921, and ending October, 1932.

Attached to and made a part of the claim filed in the Probate Court, is a letter from the decedent to the claimant dated October 25, 1926, which is as follows:

"Dear Alice:

I hereby give you my half interest in the Hilliard Co. without obligation or debt, this interest to date from Oct. 25 and any and all debt up to that time to be assumed by the undersigned and I am to have all collections outstanding on to date.

Yours Truly,

(Signed) E. E. Rhodes"

The account books of this partnership were introduced in evidence, and from these it appears that in January, 1921, under a heading entitled "Record of Partners", an entry of the word "A. E. Schaefer, Cheslet, $20.00" was made; also, that a similar entry was made each month in these books under the same heading

up to and including October, 1935, except that the entries were for varying amounts running from $50.00 to $70.00.

It is admitted that the letter referred to in the claim filed, dated Cotober 25, 1935, was written by the decedent and received by the claimant. Claimant avers that, as partners, she and decedent were in business under the name of the "Willard Company"; that by the letter written to her, the decedent dissolved the partnership and assumed and agreed to pay all the debts of the partnership; that her claim is for a debt from the partnership to the claimant on account of salary for services rendered to the Willard Company; that the letter of October 25, 1935, constituted a settlement of the accounts between the parties, and a promise, by decedent, to pay the debts of the partnership, which includes the items which she claims the books indicate to be the amounts of salary due her. It is insisted by the representatives of the estate of Rhodes that these notations appearing on the books as produced in evidence, do not show, or tend to show, that decedent had agreed to pay, or that he was indebted to claimant for any sum whatever.

The partnership agreement between the parties was entered into on May 2, 1931, for the purpose of engaging in the manufacture and sale of an eye cosmetic, and it was agreed that each of the parties, Alyce W. Schaefer and W. E. Rhodes, should own a one half interest in a certain formula; that Rhodes paid into the partnership certain promotional money and also agreed to aid in the promotion of the manufacture and sale of this article, and the letter referred to from decedent to claimant was written shortly before decedent's death.

A woman witness testified to the effect that she also was employed by the Willard Company from September, 1931 to October, 1935, and that her duties consisted of selling, packing, labeling and book work in connection with the business of the partnership. This witness identified the books of the Willard Company, and testified that she

up to and including October, 1922, except that the entries were for varying amounts running from $20.00 to $70.00.

It is admitted that the letter referred to in the claim file, dated October 30, 1921, was written by the decedent and received by the claimant. Claimant avers that, as partners, she and decedent were in business under the name of the "Allied Company"; that by the letter written to her, the decedent dissolved the partnership and assumed and agreed to pay all the debts of the partnership; that her claim is for a debt from the partnership to the claimant on account of salary for services rendered to the Allied Company; that the letter of October 30, 1921, constituted a settlement of the accounts between the parties, and a promise, by decedent, to pay the debts of the partnership, which includes the items which are claims the books indicate to be the amounts of salary due her. It is insisted by the representatives of the estate of decedent that these entries appearing on the books as produced in evidence, do not show, or tend to show, that decedent had agreed to pay, or that he was indebted to claimant for any sum whatever.

The partnership agreement between the parties was entered into on May 1, 1921, for the purpose of engaging in the manufacture and sale of an eye cosmetic, and it was agreed that each of the parties, Clyde T. Chandler and C. E. Rhodes, should own a one half interest in a certain formula; that Rhodes paid into the partnership certain promotional money and also agreed to aid in the promotion of the manufacture and sale of this article, and the letter referred to from decedent to claimant was written shortly before decedent's death.

A woman witness testified to the effect that she also was employed by the Allied Company from September, 1921 to October, 1922, and that her duties consisted of selling, packing, labeling and book work in connection with the business of the partnership. This witness identified the books of the Allied Company, and testified that she

had examined them from time to time, had made some of the entries contained therein while she worked for the partnership, and that the entries were made in the usual and ordinary course of business and were true and correct, and that they constituted a complete record of the Willard Company from the time it was started until the death of the decedent; that in July or August, 1931, the witness had a conversation with the decedent at his office at 307 North Michigan Avenue, at which meeting the claimant was present, and that the decedent there told the witness what she should do in connection with the business in which claimant and decedent were partners. This witness further testified that Rhodes had access to the books at all times during his lifetime, and that the witness had seen him inspect the books at least once or twice each month, and that she had never heard Rhodes make any objection to the items referred to in the claim filed; that Rhodes paid all of the bills of the partnership by his check, and that during all these times, the witness lived with the claimant at 516 Diversey Parkway. She also testified that the entry appearing in the books, "A. W. Schaefer, $50.00, January, 1931", and the subsequent entries were mostly in the handwriting of the claimant, but that four of them were in the handwriting of the witness; that at the time the entries were made, Rhodes told the witness that these items were to be entered every month to Mrs. Schaefer's credit; that Rhodes told the witness that "he wanted Mrs. Schaefer's salary to accumulate when he gave me the first item the first time to put in the book," and that his purpose was that he would allow these items to accumulate so that they might amount to a substantial sum. It is also in evidence that during all these times, Rhodes was paying the rent for the apartment where the claimant, her son and the witness just referred to, resided, and where the business of the partnership was transacted, and that Rhodes also, during

had examined them from time to time, but made some of the entries contained therein while she worked for the partnership, and that the entries were made in the usual and ordinary course of business and were true and correct, and that they constituted a complete record of the Hilkert Company from the time it was started until the death of the decedent; that in July or August, 1921, the witness had a conversation with the decedent at his office at 207 North Michigan Avenue, at which meeting the claimant was present, and that the decedent there told the claimant what she should do in connection with the business in which claimant and decedent were interested. This witness further testified that books had come to the books at all times during his lifetime, and that the witness had seen him inspect the books at least once or twice each month, and that she had never heard Mendes make any objection to the items referred to in the claim filed; that Mendes paid all of the bills of the partnership by his check, and that during all these times, the witness lived with the claimant at 142 Waverly Parkway. She also testified that the entry appearing in the books, "A. G. Schaefer, 120.00, January, 1921", and the subsequent entries were mostly in the handwriting of the claimant, but that four of them were in the handwriting of the witness; that at the time the entries were made, Mendes told the witness that these items were to be entered every month to Mr. Schaefer's credit; that Mendes told the witness that "he wanted Mr. Schaefer's salary to accumulate when he gave me the first item the first time to put in the book," and that his purpose was that he would allow these items to accumulate so that they might amount to a substantial sum. It is also in evidence that during all these times, Mendes was paying the rent for the apartment where the claimant, her son and the witness just referred to, resided, and where the business of the partnership was transacted, and that Mendes also, during

all these times, was paying the claimant a substantial salary as his secretary in another business which was entirely separate and distinct from the partnership business.

At the time this partnership arrangement was entered into, the written contract made between the parties shows that any anticipated profits from the undertaking were to be divided equally between the claimant and the decedent. There is nothing to indicate that it was intended by this agreement that the claimant should receive anything further than her share of the profits, and salary is not mentioned. We conclude from the record that the trade name of the article which the partnership intended to manufacture and sell was "I"-LAST. In a letter written by the decedent, Rhodes, to the witness whose testimony is hereinbefore referred to, dated September 12, 1935, by the terms of which it was suggested by the decedent that the employment of the witness by the partnership be terminated, we find the following:

> "I don't know whether or not you know it but Alyce [claimant] and I consider you one of our best friends and the right arm of the 'I'-LAST business, but on looking at the cash receipts and bills payable it shows up like a wildcat that it is not something you want a friend to hold on to but something you want that friend to let loose of.
>
> "We can't go on forever spending tax money, your salary, and all the other overhead when only half or a third of that amount is coming back in. I believe you have made up your mind that 'I'-LAST is too slow a seller to ever devote any great amount of advertising to it unless it is with a line of cosmetics. ***
>
> It has come to a point where we must realize that year before last I accepted a loss of over $2000 and last year a loss of over $3000. It so happened that it did not hurt much because I had an outside income from the contests that was allowing me to spend this money in the hopes of building up a business that would live after the contests had died out. Then W. W. died and I was sick at the time without knowing it. Alyce has kept you posted on my condition from day and you know they do not seem to find the trouble. It would be very foolish for me to go ahead and accept a yearly loss of $3000 or $4000 because I have to watch out for my own future. It is going to be a pretty hard job for a man of my age to do it unless I stick strictly to my own business."

all these times, was paying the claimant a substantial salary on his assertion in another business which was entirely separate and distinct from the partnership business.

In the time this partnership-joint venture was entered into, the written contracts made between the parties showed that any material profits from the enterprise were to be divided equally between the claimant and the decedent. There is nothing to indicate that it was intended by this agreement that the claimant would receive anything further than her share of the profits, and salary is not mentioned. In consideration from the records that the trade name of the vehicle using the enterprise intended to manufacture was sold was "I'-Lite". In a letter written by the decedent, Hudson, to the witness where testimony is Darlinghurst related to, dated September 12, 1958, by the terms of which it was suggested by the decedent that the employment of the witness by the enterprise be terminated, he that the following:

"I don't know whether or not you know it but Alyce [claimant] and I consider you one of our best friends and the right arm of the 'I'-Lite business, but on looking at the year results and bills anybody is above up like a wildcat but it is not something you want a friend to hold on to but something you want that friend to let loose of.

"We don't go on forever spending too money, your salary, and all the other overhead when only half or a third of that income is coming back in. I believe you have made my point that 'I'-Lite is too nice a gadget to ever devote my great energy of advertising to it unless it is with a line of economics."

It has come to a point where we must realize that your before last I measure a loss of over fifty and last year a loss of over [illegible]. It we supposed that it did not look good because I had no outside income from the contracts that was allowing me to spend this money in the hopes of building up a business that could live after the contracts had died out. Then a. Mind and I was glad to the time without knowing it. Alyce you just you needed on my commission from my and you know they to not even to find the trouble. It would be very foolish for me to go ahead and accept a yearly loss of fifty or [illegible] because I have to watch out for my own future. It is going to be a pretty hard job for a man of my age to do it unless I stick strictly to my own business."

The record indicates that at the time the letter on which this claim is predicated was written, there were several small items due by the partnership, and other small sums due and owing to it, and we conclude from the whole record that the decedent had nothing further in mind than these items when he wrote this letter. Decedent's letter to the witness dated September 12, 1935, hereinbefore referred to, clearly shows that he intended to make no further outlay in connection with the undertaking.

Both the Probate and Circuit Court heard and saw the witness for claimant and examined the documents, and were in a better position to pass upon the bona fides of the claim and the credibility of this one witness than we are. We are of the opinion that we are not justified in disturbing the finding. The judgment of the Circuit Court of Cook County is, therefore, affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

The record indicates that at the time the letter on which this claim is predicated was written, there were several small items due by the partnership, and other small sums due and owing to it, and we conclude from the whole record that the document had nothing further in mind than these items when he wrote this letter.

Defendant's letter to the claimant dated September 17, 1870, hereinbefore referred to, clearly shows that he intended to make no further outlay in connection with the undertaking.

Both the Probate and Circuit Court heard and saw the witnesses for claimant and examined the documents, and were in a better position to pass upon the good faith of the claim and the credibility of this and witness than we are. In view of the opinion that we are not justified in disturbing the finding, the judgment of the Circuit Court of Cook County is therefore, affirmed.

AFFIRMED.

Reed, P.J. and Scott J. concurring, a. opinion.

39600

STATE MUTUAL LIFE ASSURANCE COMPANY, a corporation, Plaintiff below, Appellee and Cross-Appellant,	APPEAL FROM
v.	SUPERIOR COURT
JEAN S. RATH, et al., Defendants below, NORMAN A. STILWELL, Appellee and Cross-Appellee,	COOK COUNTY.
On Appeal of DAVID P. STEARNS and ALBERTA H. STEARNS, Appellants.	295 I.A. 619

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by David P. Stearns and Alberta H. Stearns from a decree of the Superior Court of Cook County, entered in a foreclosure proceeding instituted by the State Mutual Life Assurance Company. The trust deed involved is dated April 1, 1928, and was executed by Jean S. Rath and Walter F. Rath, her husband, and David P. Stearns and Alberta H. Stearns, his wife, by which trust deed the premises described therein were conveyed to the Cody Trust Company, as trustee, to secure the payment of an indebtedness of $68,500.00, with interest. The indebtedness was evidenced by a principal note and a series of interest notes. The plaintiff is the owner of the unpaid portion of the indebtedness which the trust deed was given to secure, and no question is raised as to its right to maintain this proceeding. The Raths were originally made parties defendant, but were later dismissed from the proceeding. Issues were joined on the complaint as amended, the answer of the Stearnses to the complaint, and the answer of Norman A. Stilwell. Both plaintiff and the Stearnses claim that Norman A. Stilwell had assumed and agreed to pay the debt. The matter was referred to a Master in Chancery, and the evidence taken before him shows the following:

Prior to January, 1931, Norman A. Stilwell, a defendant in

State ex rel. Life Insurance Company,
a corporation, Plaintiff below,

Appellee and Cross-Appellee,

v.

Norman A. Hall, et al., Defendants below,

Appellant. Utility,

Appellee and Cross-Appellee,

on appeal of Hall A. Stanley and
Charles E. Stanley,

Appellants.

295 I.A. 619

Notice this opinion is subject to revision before it is published in the official reports.

This is an appeal by Hall A. Stanley and Charles E. Stanley from a judgment of the Superior Court of Cook County, entered in a foreclosure proceeding instituted by the State Mutual Life Assurance Company. The trust deed involved is dated April 1, 1929, and was executed by John G. Roth and Walter F. Roth, his husband, and David M. Stanley and Alberta G. Stanley, his wife, by which trust deed the premises described therein were conveyed to the Body Trust Company, as trustee, to secure the payment of an indebtedness of $28,000.00, with interest. The indebtedness was evidenced by a principal note and a series of interest notes. The plaintiff is the owner of the unpaid portion of the indebtedness which the trust deed was given to secure, and no question is raised as to its right to maintain this proceeding. The notes were originally made payable defendant, but were later discharged from the proceeding. Issues were joined on the complaint as amended, the answer of the Stanleys to the complaint, and the answer of Utility. Both plaintiff and the Stanleys claim that Norman A. Utility had assumed and agreed to pay the debt. The matter was referred to a master in chancery, and the evidence taken before him shows the following:

Prior to January, 1929, Norman A. Utility, a defendant in

Norman A.

the foreclosure proceeding, and cross-appellee, held a second mortgage on the property involved for the sum of $28,130. In February, 1931, the Stearnses and the Raths conveyed their interest in the property to Stilwell and executed and delivered to him a warranty deed which contains the following recital:

> "Subject to special assessments and special taxes, if any, not confirmed, and to taxes for the years 1928, 1929, 1930 and 1931, and Subject also to trust deed dated April 1, 1928, and recorded April 28, 1928, as document No. 10002407 made by Jean S. Rath and husband and David P. Stearns and wife to Cody Trust Company, to secure their 16 notes Nos. 1 to 15 for fifteen hundred dollars each and No. 16 for forty six thousand dollars, due on the first of March and September, 1931, 1932, 1933, 1934, 1935, 1936, 1937 and 1938, respectively, with interest from September 1, 1928, at 5-1/2% per annum, payable semi-annually."

Prior to the conveyance by the Stearnses and Raths of their interests in the property to Stilwell, and apparently after conversations between them and Stilwell, David P. Stearns received a letter from Stilwell in which Stilwell suggested to Stearns that in view of the heavy expenses attached to the maintenance of the building on the property in question, and that as there were no funds left from the income of the building to meet the taxes, together with interest on payments maturing in April, 1931, that if the Stearnses and Raths desired to do so, they should convey their interest in the premises to Stilwell, and that then he would agree to and would pay all the taxes for the years 1928, 1929, 1930 and 1931, and meet the first mortgage due April 1, 1931; also that he, Stilwell, would rearrange the rents and see to it that - as the letter stated - "the building would be put on a carrying proposition, and after all taxes, interest and prepayments are paid in full, I would arrange to convey this property back to you at reasonable terms." Stearns rejected this offer, and it is Stillwell's contention that it was finally agreed between the parties that the owners of the equity would convey all their interest therein to Stilwell for the sum of $4,230.00 in cash, and that in addition, Stilwell would pay the

the Torontonians investing, and cross-examine, until a crisis arrives on the scenery leaving for the end of 1929. In reverse, 1931, the directors and the news managed their interest in the scenery to fulwell and remained and believed to sin a strategy land which contains the following models:

"Subject to special arrangements and credit terms, if any, has omitted, had to those the years 1927, 1928, 1929 and 1931, and subject also to usual terms until 1, 1930, and removed April 30, 1932, as governed to. INTEREST made by Jean 6, with and business and lovely . Interest and site to body that company, to answer their 12 notes due, 1 to 12 for fifteen hundred dollars each and to, 10 for forty six thousand dollars, due on the first of March and September, 1931, 1932, 1933, 1934, 1935, 1936, 1937 and 1938, respectively, with interest from September 1, 1928, at 5-1/2% per annum, payable semi-annually."

Prior to the conversion by the directors and after of their interests in the property to fulwell, and subsequently after conversations between them and fulwell, model 1, Jeanne received a letter from fulwell in which fulwell suggested to Jeanne that in view of the heavy expenses attached to the maintenance of the building on the property in question, and that as there are no tenants left from the lease of the building to meet the terms, whether she believed it worthwhile working in April, 1932, that if the directors and myself decided to do, they should entrey their interest in the premises to fulwell, and that then he would agree to and would pay all the taxes for the years 1929, 1930, 1931 and 1932, and meet the first mortgage due April 1, 1932; also that he, fulwell, would rearrange the terms and set to it that - as the letter stated - "the building would be put on a working proposition, and then all taxes, interest and prepayments are paid in full, I would arrange to convey this property back to you at reasonable terms." Jeanne replied this letter, and it is fulwell's suggestion that it was finally agreed between the parties that the owners of the equity would convey all their interest therein to fulwell for the sum of $4,500.00 in cash, and that in addition, fulwell would pay the

balance due on some ice boxes in the premises, together with the back taxes and accrued interest. Thereafter, the Stearnses and the Raths executed a warranty deed, conveying the property to Stilwell, in consideration of the expressed sum of $10.00 and other good and valuable consideration, subject to special assessments and special taxes, if any, not confirmed, and to taxes for the years 1928, 1929, 1930 and 1931, and subject to the trust deed involved in this foreclosure proceeding. In this document it is recited that at that time there was a balance due on the principal debt of $46,000.00, together with the amounts due on a series of unpaid interest notes. On February 7, 1931, an agreement was entered into between the parties to the transaction containing a recitation to the effect that the Raths and Stearnses had sold their equity in and to the property in question to Stilwell, and that under the agreement of sale, David P. Stearns and Jeans Stearns Rath were entitled to all rents from and after March 1, 1931; that as certain tenants living in the premises were indebted to David P. Stearns and Jean Stearns Rath for back rent, it was agreed between the parties that they should have the right to collect all rents due prior to March 1, 1931, and that in further consideration of the conveyance of the property Stilwell agreed that in case it should become necessary for David P. Stearns and Jean Stearns Rath to sue any of the tenants for such back rent, he, Stilwell, would turn over the leases to their attorney so that judgment by confession might be entered against the tenants for all rents due them prior to March 1, 1931,

It is to be noted here that neither in the warranty deed from the Stearnses and Raths to Stilwell, nor in the contract entered into between the parties, is there any language to indicate that Stilwell assumed and agreed to pay the first mortgage. An undated document signed by Stilwell contains the following:

taxes due on some tax bills in the township, together with the back taxes and accrued interest. Therefore, the trustees and the Rotha executed a quitclaim deed, conveying the property to Tillwell, in consideration of the assumed sum of $10,000 and other good and valuable considerations, subject to school assessments and unpaid taxes, if any, not contested, and to taxes for the years 1918, 1920, 1920 and 1921, and subject to the taxes that involved in this foreclosure proceeding. In this document it is recited that it was thought there was a balance due on the original debt of $10,000.00, together with the accrued fee on a notice of default interest notes. On February 7, 1921, an agreement was entered into between the parties to the transaction concluding a rescission to the effect that the Rotha and Dekrowa had sold their equity in and to the property in question to Tillwell, and that under the agreement of sale, David F. Stearns and Jonas Stearns both were entitled to all rents from and after March 1, 1921; that as certain tenants living in the premises were indebted to David F. Stearns and Jonas Stearns both for back rent, it was agreed between the parties that they should have the right to collect all rents due prior to March 1, 1921, and that in further consideration of the conveyance of the property Tillwell agreed that in case it should become necessary for David F. Stearns and Jonas Stearns both to be one of the bidders for such back rent, Tillwell would turn over the issues to their attorney so that judgment by confession might be entered against the tenants for all rents had them prior to March 1, 1921.

It is to be noted here that neither in the agreement dated from the Stearnses and Rotha to Tillwell, nor in the contract entered into between the parties, is there any language to indicate that Tillwell assumed and agreed to pay the first mortgage. An undated document signed by Tillwell contains the following:

"1th mtge.	$68,500
2 th mtge.	$28,130
taxes 3 years 1 month	$ 6,485
Bal. on the Box. about	$ 1,500
interest on 1 th mtg.	$ 1,883
	106,498
Cash 2500	2,500
	108,998

I think this is a mighty fair offer at this time on the present rental. Let me hear from you in regards to this, or maybe you will have something new to offer.

Write or call me at my home, Irving 7943, or at 3647 Eastwood Ave.

W. A. Stilwell,
Chicago."

There was also introduced in evidence by Stearns the following document:

"1 th mtge.	$68,500
2nd "	$28,130
Taxes	$ 6,485
Interest on 1th	$ 1,883
cash	$ 2,000
	108,998
Bal. due on the boxes about	1,500
	$108,498"

David P. Stearns testified that the consideration proposed to him by Stilwell for the building was the first mortgage of $68,500.00, the second mortgage of $28,130, the unpaid taxes for three years amounting to $6,485.00, balance due on unpaid taxes, $1,500.00, together with interest on the first mortgage amounting to $1,883.00, making a total of $106,498, and that the total consideration for the conveyance of the property from the Stearnses and Raths to Stilwell was $300.00 more than the amount just mentioned, or $109,298.00. The evidence further shows that at the time of the delivery of the deed, Stilwell gave Stearns a check for $4,230.00. Thereafter, Stilwell released the second mortgage held by him.

On the hearing before the Master, counsel representing the plaintiff asked counsel representing the Stearnses whether or not the Stearnses claimed that Stilwell assumed and agreed to pay this first mortgage, and in reply counsel for the Stearnses replied, "No". In the answer filed by the Stearnses, a statement is made to the effect

"1st mtge.	$20,000
2 nd mtge.	15,000
terms 3 years I could	1,000
get on the new. about	1,000
interest on I th mtg.	1,000
	1,000
	10,000
Cash 1000	1,000
	1,000
	10,000

I think this is a mighty fair offer of this time on the present rental. Let me hear from you in regards to this, as maybe you will have something sure to offer.

Trusting we shall be at my home, living free, or at Rief instead ive.

J. A. Tillwell,
Broker.

There was also introduced in evidence by Barrow the following document:

"1 th mtge.	$20,000
2nd	15,000
terms	5,000
Interest on 1th	1,000
cash	1,000
	10,000
Int. due on the boxes about	1,000
	10,000"

David F. Barrow testified that the consideration imposed to him by Tillwell for the building was the first mortgage of $20,000.00, the second mortgage of $15,000, the monthly rents for three years amounting to $6,000.00, interest due on unpaid rents, $1,000.00, together with interest on the first mortgage amounting to $1,000.00, making a total of $10,000, and that the total consideration for the conveyance of the property from the Barrows and Hahn to Tillwell was $100.00 more than the amount just mentioned, or $10,000.00. The evidence further shows that at the time of the delivery of the deed, Tillwell gave Barrow a check for $4,000.00. Therefore, Tillwell received the second mortgage held by him.

On the hearing before the Master, counsel representing the plaintiff asked counsel representing the Barrows whether or not the Barrows claimed that Tillwell assumed and agreed to pay this first mortgage, and in reply counsel for the Barrows replied, "No". In the answer filed by the Barrows, a statement is made to the effect

that as a part of the consideration for the conveyance by the Stearnses and Raths of their interest intthe property involved, Stilwell assumed and agreed to pay the indebtedness secured by the trust deed sought to be foreclosed, and further, that after the conveyance of the property to Stilwell, Stilwell negotiated and secured from the owners of the mortgage an extension of time for the payment of the indebtedness, or part thereof, and that the payment of the indebtedness was extended without the knowledge of the Stearnses. This latter statement is made upon information and belief. The attorney who represented Stilwell at the time the deal was made between the Stearnses, Raths and Stilwell, testified that Stearns at that time expressed a desire that Stilwell assume and agree to pay this first mortgage, but that Stilwell declined to do so. Stilwell testified to the same effect. As to the claim that Stilwell secured an extension of the time of payment of the indebtedness without the knowledge and consent of the Stearnses, the evidence shows that Stilwell attempted to secure such extension and paid to the mortgagee the sum of $75.00 as a consideration for such extension, but that shortly thereafter the mortgagee returned the $75.00 to Stilwell and declined to extend the time for the payment of the indebtedness secured by the mortgage sought to be foreclosed.

It is also contended by the Stearnses that subsequent to the purchase of the premises by Stilwell, Stilwell entered into an agreement with the plaintiff without the knowledge or consent of the Stearnses, wherein and whereby the terms and provisions of the mortgage were materially altered and modified. The modification to which plaintiff calls attention, gave the owner of the indebtedness power and authority to remove the original indenture trustee and appoint a successor trustee, and gave plaintiff the power to place insurance on the property in question. We are of the opinion that this contention is without merit.

that as a part of the consideration for the conveyance by the
testatrix and both of their interest in the property involved,
Tillwell assumed and agreed to pay the indebtedness secured by the
trust deed as got to be foreclosed, and further, that after the
conveyance of the property to Tillwell, Tillwell negotiated and
secured from the owners of the mortgage an extension of time for
the payment of the indebtedness, at that interest, and that the pay-
ment of the indebtedness was extended within the knowledge of the
testatrix. This latter statement is made upon information and
belief. The attorney who represented Tillwell at the time the deal
was made between the testatrix, Doris and Tillwell, testified that
therein at that time expressed a belief that Tillwell thought and
agree to pay this first mortgage, but that Tillwell declined to do
so. Tillwell testified to the same effect. He is the claim that
Tillwell secured an extension of the time of payment of the indebted-
ness without the knowledge and consent of the testatrix, the evidence
shows that Tillwell attempted to secure such extension and paid to
the mortgagee the sum of $25.00 as a consideration for such extension,
but that shortly thereafter the mortgagee returned the $25.00 to
Tillwell and declined to extend the time for the payment of the
indebtedness secured by the mortgage sought to be foreclosed.

It is also contended by the testatrix that subsequent to
the purchase of the premises by Tillwell, Tillwell borrowed loan on
agreement with the plaintiff without the knowledge or consent of
the testatrix, wherein the mortgage the terms and provisions of the
mortgage were materially altered and modified. The modification to
which plaintiff calls attention, gave the owner of the indebtedness
power and authority to remove the original insurance and
procure a successor insurer, and gave plaintiff the power to place
insurance on the property in question. In are of the opinion that
this contention is without merit.

The Master found, and the court decreed, that Stilwell was not personally liable to pay the note, and both plaintiff and the Stearnses appealed.

In Ray v. Lobdell, 213 Ill. 389, a similar situation to that presented in the instant case, was involved. It was there insisted that one Reiss had, under somewhat similar circumstances, assumed and agreed to pay a mortgage indebtedness existing at the time he acquired certain property from a person named Stoner, and in passing upon the question as to whether or not Reiss had assumed and agreed to pay the indebtedness, the Supreme Court said:

> "Doubtless Reiss expected, when he made the trade, that he would, in time, pay off the encumbrances and clear the property of all liens. Unless he entertained this expectation it would have been folly on his part to have made the trade and paid anything for a deed from Stoner; but the fact that he expected to pay the mortgages, and even paid some interest to holders of the mortgages, cannot be held sufficient to fix his personal liability."

We think the language of the Supreme Court is applicable to the situation presented here. It is reasonable to assume that when Stilwell took over the property, he intended to see to it that the debt against the property was paid off, but we are unable to discover from the record that he assumed the obligation and agreed to pay this indebtedness. In case of a deficiency after sale, of course, the Stearnses would be liable on their note.

We are, therefore, of the opinion that the decree of the Superior Court should be and it is affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

The Judge found, and the court decreed, that Ellwell was not personally liable to pay the note, and both plaintiff and the creditors appealed.

In Lee v. Lockwood, 40 Ill. 294, a similar situation to that presented in the instant case, was involved. It was there indicated that one Jales had, under somewhat similar circumstances, assumed and agreed to pay a mortgage indebtedness existing on the land he acquired from a person named Sbener, and in passing upon the question as to whether or not Jales had assumed and agreed to pay the indebtedness, the Supreme Court said:

> "Questions under expected, when he made the trade, that he would, in time, pay off the encumbrance and clear the property of all liens. Unless he entertained this expectation it could have been hardly an idle part to have made the trade and paid anything for a farm free of debts; but the fact that he expected to pay the mortgage, and even paid some interest in lieu of the mortgage, seems to hold sufficient to fix his assumed liability."

In light the language of the Supreme Court, it is applicable to the situation presented here. It is reasonable to assume that when Ellwell took over the property, he intended to use it so that the debt against the property was paid off, but at the middle to discover from the events that he assumed the obligation and agreed to pay said indebtedness. In case of a deficiency after sale, of course, the [illegible] would be liable as said note.

We can, therefore, at the opinion that the decree of the Superior Court should be and it is affirmed.

affirmed.

Kerr, P.J. and Ritz J. concur, J. Gordon.

39312

CITY OF CHICAGO,

Appellee,

v.

JOHN BENGSTACKE,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

3B4

295 I.A. 619 2

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Defendant was charged with "interfering with arresting officer while same was making an arrest, causing a disturbance * * * in violation of Section 4174 of the Revised Chicago Code of 1931", and it is alleged that the offense was committed on June 19, 1937. A trial was had in the Municipal Court of Chicago on June 21, 1937, and defendant was found guilty. A number of witnesses were produced by both the City of Chicago and defendant, and the time fixed as the date of the occurrence was "June 19th". None of them mentioned the year.

In City of Chicago v. Simmons, 213 Ill. App. 679 (Abstract Opinion), this court said:

> "The judgment must be reversed and the cause remanded, for two sufficient reasons: (1) No evidence was introduced as to the year that the alleged violation of the ordinance occurred. This was necessary in order to prove that the offense was committed within the limited statutory period. The failure to make this proof was of course an oversight, but without this evidence, the judgment cannot stand. Cases supporting this view are The People v. Hood, 191 Ill. App. 33; The People v. Jackson, 178 Ill. App. 355; State v. Sauerburger, 64 Mo. App. 129; Meinert v. State, 35 Fla. 229."

Several other questions are presented, including an attack on the complaint filed, but in view of the fact that the judgment will have to be reversed, we will not pass upon any of them.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39656

CHARLOTTE GADSKY and GRETA GADSKY,

Plaintiffs - Appellants,

v.

H. R. BENTLEY and SENECA PETROLEUM COMPANY, a corporation,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

295 I.A. 619

ON REHEARING.

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

At the time the petition for a rehearing was filed by the defendant H. R. Bentley, there was also submitted to us a motion and suggestions on behalf of the Seneca Petroleum Company, a corporation, which was accompanied by an affidavit calling our attention to the fact that the appeal was not taken on behalf of the plaintiffs against the defendant Seneca Petroleum Company, but only against the defendant H. R. Bentley.

Upon an inspection of the record we find that a motion for a new trial was submitted on behalf of "defendants", which included the Seneca Petroleum Company. We find that the notice for a new trial and the motion for a new trial both included the defendant Seneca Petroleum Company.

The order entered by the trial court on December 17, 1936, however, refers to defendant and interest and judgment for costs against the defendant, although it does not specify which one.

The notice for appeal, however, in its title includes both H. R. Bentley and Seneca Petroleum Company, as defendants, but in the body of the notice it refers merely to defendant, not specifying which defendant. The notice for the appeal, however, is addressed to the attorneys as attorneys for one defendant, H. R. Bentley, and entirely omits the name of the Seneca Petroleum Company, a corporation.

MR. JUSTICE DAVIS E. SMITH DELIVERED THE OPINION OF THE COURT.

At the time the petition for a rehearing was filed by the defendant H. R. Bentley, there was also submitted to us a motion and suggestions on behalf of the Essex Petroleum Company, a corporation, which was accompanied by an affidavit making our intention to the fact that the appeal was not taken on behalf of the plaintiff against the defendant Essex Petroleum Company, but only against the defendant H. R. Bentley.

Upon an inspection of the record we find that a motion for a new trial was submitted on behalf of defendant, which included the Essex Petroleum Company. We find that the motion for a new trial and the motion for a new trial both included the defendant Essex Petroleum Company.

The order entered by the trial court on December 17, 1928, however, refers to defendant and interest and judgment for costs against the defendant, although it does not specify which one.

The motion for appeal, however, in its title includes both H. R. Bentley and Essex Petroleum Company, as defendants, but in the body of the motion it refers merely to defendant, not specifying which defendant. The notice for the appeal, however, is addressed to the attorneys as attorneys for one defendant, H. R. Bentley, and entirely omits the name of the Essex Petroleum Company, a corporation.

It is quite evident now that because of the way in which the words defendant and defendants were used, this court inadvertently included the defendant Seneca Petroleum Company, as being an appellee in this court. That should not have been done and it now appears no appeal was perfected from the order of the trial court directing the jury to find the defendant Seneca Petroleum Company, a corporation, not guilty.

Upon a rehearing of this cause this court hereby directs that the opinion heretofore filed be corrected by eliminating therefrom the last paragraph, and substituting therefor the following:

For the reasons herein given the verdict and judgment of the Circuit Court as to the defendant H. R. Bentley is hereby reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND HALL, J. CONCUR.

It is quite evident that the [illegible] of the jury in which the words *deliberate* and *deliberation* were used, this court inadvertently included the statement "some particular instance," as being an appellee in this suit. That should not have been done but it was apparent to appeal was prejudiced from the order of the trial court directing the jury to find the defendant "guilty of voluntary manslaughter, but guilty.

Upon a rehearing of this cause this court hereby directs that the original opinion filed in sustained by eliminating "deliberate from the last paragraph, and substituting therefor the following:

For the reasons herein given the verdict and judgment of the Circuit Court in the determination of the matter is hereby reversed and the cause is remanded for a new trial.

[illegible]

REVERSED, F.J. AND REMANDED, [illegible].

39656

CHARLOTTE GADSKY and GRETA GADSKY,

Plaintiffs - Appellants,

v.

H. R. BENTLEY and SENECA PETROLEUM COMPANY, a corporation,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

295 I.A. 619

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Charlotte Gadsky and Greta Gadsky, brought suit against the defendants, H. R. Bentley and the Seneca Petroleum Company, a corporation, to recover damages for injuries sustained by said plaintiffs on September 3, 1934.

On defendants' motion, the court directed a verdict in favor of the Seneca Petroleum Company, at the end of plaintiffs' evidence, but refused to direct a verdict as to the defendant Bentley.

At the close of all the evidence the jury returned two separate verdicts each verdict finding the defendant Bentley not guilty as to both plaintiffs, Charlotte and Greta Gadsky.

After overruling plaintiffs' motion for a new trial and in arrest of judgment, the court entered judgment on the verdicts that the defendants recover of and from the plaintiffs their costs and have execution therefor.

No point is raised as to the pleadings.

The evidence shows that on September 3, 1934, Greta Gadsky and her daughter Charlotte left Waukegan, Illinois in their Hudson automobile and drove in a northerly direction towards their home in Milwaukee; that after they had driven about 5 miles they were struck by a Buick automobile approaching from the north which was driven by the defendant Bentley; that Wilbur Fox, a friend of Bentley's sat in the front seat with him; that plaintiff Charlotte Gadsky and Wilbur Fox, a witness for the defense, were both quite severely injured.

Plaintiffs - Respondents,

v.

E. B. BURLEY and [illegible] Motorbus Company, a corporation,

Defendants - Appellants.

Appeal from Superior Court of King County.

Hon. Jeremiah Neterer, Judge.

Affirmed.

Plaintiffs, Charlotte Hurley and Grace Hurley, brought suit against the defendants, E. B. Burley and the Seattle Interurban Company, a corporation, to recover damages for injuries received by said plaintiffs on September 2, 1924.

On defendants' motion, the court directed a verdict in favor of the Seattle Interurban Company, at the end of plaintiffs' evidence, but refused to direct a verdict as to the defendant Burley.

At the close of all the evidence the jury returned two separate verdicts each verdict finding the defendant Burley not guilty as to both plaintiffs, Charlotte and Grace Hurley.

After overruling plaintiffs' motion for a new trial and in arrest of judgment, the court entered judgment on the verdicts that the defendants recover of and from the plaintiffs their costs and have execution therefor.

No point is raised as to the judgment.

The evidence shows that on September 2, 1924, Grace Hurley and her daughter Charlotte left Bellingham, Illinois in their Buick automobile and drove in a northerly direction towards their home in Milwaukee; that after they had driven about 2 miles they were struck by a Buick automobile approaching from the north which was driven by the defendant Burley; that Elmer Fox, a friend of Burley's sat in the front seat with him; that plaintiff Charlotte Hurley and Elmer Fox, a witness for the defense, were both quite severely injured.

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The evidence further shows that Wilbur Fox brought suit against Bentley and the Seneca Petroleum Company in the Superior Court of Cook County; that about March 16, 1935, Fox filed an affidavit in that case with the Executive Committee of Judges of the Superior Court for leave to sue as a "poor person"; that on March 26, 1935, he filed his complaint in said cause wherein he charged said defendants "with a conscious indifference to surrounding circumstances and conditions, wilfully and wantonly operated said automobile and caused it to collide with another automobile on said route, etc."

The evidence further shows that Fox did not mention Greta or Charlotte Gadsky in said complaint; that a deposition was taken in said cause by his attorney; that Fox claimed he was subpoenaed by the Seneca Petroleum Company, although he was the plaintiff; that in the instant case he was a witness for the defendant Bentley.

The theory of the plaintiffs is that they were denied a fair trial when the court refused to permit plaintiffs' counsel to cross-examine the witness Wilbur Fox about his interest in this case and why he changed his story after bringing suit against Bentley to become his principal witness; that the court erred in refusing to admit in evidence Fox's "pauper affidavit" and his complaint in his said suit for impeachment purposes, after a foundation had been laid by allowing him to examine these documents in a hearing outside the presence and hearing of the jury; that the verdict of the jury is contrary to the manifest weight of the evidence.

The theory of the defendant Bentley is that the plaintiffs received a fair trial and, therefore, the verdict and judgment is just and proper.

Defendant contends if there was any error in refusing to

The evidence further shows that either for brought suit against Bentley and the Texas Petroleum Company in the Superior Court of Cook County; that about March 18, 1925, for filed an affidavit in that case with the Executive Committee of Judges of the Superior Court for leave to sue as a "poor person"; that on March 26, 1925, he filed his complaint in said cause wherein he charged Bill Bedenbaugh "with a wanton and willful disregard of the surrounding circumstances and conditions, willfully and wantonly operated said automobile and caused it to collide with another automobile on said route, etc."

The evidence further shows that for did not mention Oreta or Charlotte Bentley in said complaint; that a deposition was taken in said cause by his attorney; that for claimed he was subpoenaed by the Texas Petroleum Company, although he was the plaintiff; that in the instant case he was a witness for the defendant Bentley.

The theory of the plaintiffs is that they were denied a fair trial when the court refused to permit plaintiffs' counsel to cross-examine the witness Wilbur for about his interest in this case and why he changed his story after bringing suit against Bentley to become his principal witness; that the court erred in refusing to admit in evidence for's "pauper affidavit" and his complaint in his said suit for impoverishment purposes, after a foundation had been laid by allowing him to examine these documents in a hearing outside the presence and hearing of the jury; that the verdict of the jury is contrary to the manifest weight of the evidence.

The theory of the defendant Bentley is that the plaintiffs received a fair trial and, therefore, the verdict and judgment is just and proper.

Defendant contends if there was any error in refusing to

admit the exhibits, the error was inconsequential as the jury was otherwise informed that there was a suit growing out of the same accident, entitled, Fox v. Seneca Petroleum Company.

As to what actually happened at the time of the collision, there is the usual conflict in testimony as to facts. It is agreed that the road on which the accident happened was a two lane highway and plaintiff Greta Gadsky contends she is an experienced driver, having driven for some 12 years. The evidence shows that plaintiff's daughter was sitting at her side in their Hudson automobile and they were proceeding in a northerly direction at a speed of from 20 to 25 miles an hour when they saw a Buick automobile approaching from the north and proceeding south. Plaintiffs claim that when the Buick automobile got within 75 feet from plaintiffs, the driver of the Buick, defendant herein, suddenly pulled his car over to the left, and seeing that a collision was imminent, plaintiff turned her car also to the left to avoid the Buick automobile, whereupon defendant again turned to the right and struck plaintiffs' automobile on the right-hand side, resulting in severe injuries to both plaintiffs, as well as to Fox who was riding with the defendant.

The evidence further shows that immediately after the collision the defendant Bentley stepped from his automobile and assisted in removing the injured persons and gave his card to the plaintiff Greta Gadsky; that said card read as follows:

"Calumet 5122.

"SENECA PETROLEUM COMPANY
INC.
Petroleum Products
430 West 33rd St.
CHICAGO

"H. R. Bentley
Road & Street Dept."

Plaintiff, Greta Gadsky, testified that she and her daughter Charlotte were driving to their home in Milwaukee, Wisconsin

admit the exhibits, the error was inconsequential as the jury was otherwise informed that there was a suit growing out of the same accident, entitled, Lux v. Indian Refining Company.

As to what actually happened at the time of the collision, there is the usual conflict in testimony as to facts. It is agreed that the road on which the accident happened was a two lane highway and plaintiff Orsta Oakley Courtois was an experienced driver, having driven for some 12 years. The evidence shows that plaintiff's daughter was sitting at her side in their Hudson automobile and they were proceeding in a northerly direction at a speed of from 30 to 35 miles an hour when they saw a Buick automobile approaching from the north and proceeding south. Plaintiffs claim that when the Buick automobile got within 75 feet from plaintiffs, the driver of the Buick, defendant Lerain, suddenly pulled his car over to the left, and seeing that a collision was imminent, plaintiff turned her car also to the left to avoid the Buick automobile, whereupon defendant again turned to the right and struck plaintiffs' automobile on the right-hand side, resulting in severe injuries to both plaintiffs, as well as to Fox who was riding with the defendant.

The evidence further shows that immediately after the collision the defendant hastily stepped from his automobile and assisted in removing the injured persons and gave his card to the plaintiff Orsta Oakley; that said card read as follows:

"Claimant Dept.

"Standard Petroleum Company
Inc.
Petroleum Products
430 West 33rd St.
CHICAGO

"H. E. Bentley
Road & Street Supt."

Plaintiff, Orsta Oakley, testified that she and her daughter Charlotte were driving to their home in Kiltinglee, Wisconsin

4

on September 3, 1934; that she was driving the automobile on the day of the accident and had driven an automobile for 14 years; that when they were about ~~five~~ 65 miles out of Waukegan and on their way to Milwaukee, she saw an automobile approaching from the north, about 300 feet from her; that she was traveling at about 25 miles an hour; that the defendant's automobile was traveling from 55 to 60 miles an hour; that defendant's automobile was traveling in the middle of the road; that she turned to the left and defendant turned to the left; that she slowed down her automobile to about 20 miles an hour and blew the automobile horn; that she turned to the left "real fast" but did not skid; that the front part of defendant's automobile struck plaintiffs' car; that after the collision both cars were on the west side of the highway, on the shoulder of the road; that defendant pushed plaintiff's car into the ditch and her automobile was headed west to southwest; that immediately after the accident defendant gave her his card and said he was sorry and would take care of her daughter.

The defendant Bentley testified that he was employed by the Seneca Petroleum Company, the other defendant; that he was the superintendent of the asphalt plant at Joliet; that on September 3, 1934, he had an accident while driving a Buick automobile about 5 miles north of Waukegan; that he was driving south on the west side of the highway; that when he first noticed plaintiffs' automobile the two right wheels were off the cement and that the shoulder of the road was muddy as it had been raining; that when plaintiff tried to pull the automobile back onto the road it came straight across the road in front of him; that from the time he saw plaintiffs' automobile until the impact he was on the west side of the road and had not crossed over any portion of the black line which divided the roadway; that he tried to stop and applied his brakes; that the

on September 3, 1934; that she was driving the automobile on the day of the accident and had driven an automobile for 14 years; that when they were about five miles out of Muskegon and on their way to Milwaukee, she saw an automobile approaching from the north, about 300 feet from her; that she was travelling at about 35 miles an hour; that the defendant's automobile was travelling from 50 to 60 miles an hour; that defendant's automobile was travelling in the middle of the road; that she turned to the left and defendant turned to the left; that she slowed down her automobile to about 20 miles an hour and blew the automobile horn; that she turned to the left "real hard" but did not skid; that the front part of defendant's automobile struck plaintiffs' car; that after the collision both cars were on the west side of the highway, on the shoulder of the road; that defendant pushed plaintiff's car into the ditch and her automobile was headed west to southwest; that immediately after the accident defendant gave her his card and said he was sorry and would take care of her damages.

The defendant Smiley testified that he was employed by the Sinclair Petroleum Company, the other defendant; that he was the superintendent of the asphalt plant at Joliet; that on September 3, 1934, he had an accident while driving a Buick automobile about 5 miles north of Muskegon; that he was driving south on the west side of the highway; that when he first noticed plaintiffs' automobile the two right wheels were off the pavement and that the shoulder of the road was muddy as it had been raining; that when plaintiff tried to pull the automobile back onto the road it came straight across the road in front of him; that from the time he saw plaintiffs' automobile until the impact he was on the west side of the road and had not crossed over any portion of the black line which divided the roadway; that he tried to stop and applied his brakes; that the

front end of his car hit the side of plaintiffs' automobile and that immediately after the collision both automobiles were down on the right side of the road; that when he first observed plaintiffs' automobile his speed was from 35 to 40 miles an hour and plaintiff was driving about 35 miles an hour.

Defendant Bentley further testifying stated that the automobile he was driving was a partnership automobile and that when he was on his own business he paid for the gas and when on the company's business the company paid for the gas; that he was returning from a trip to Wisconsin where he had been to look at some farm lands; that when he first saw plaintiffs' automobile it was about 300 feet in front of him; that he did not do any fishing while he was in Wisconsin; that when he first saw plaintiffs' automobile he kept going on, but that when he saw them trying to get back on the road he started applying his brakes; that the effort to get back on the road was made when the two automobiles were about 50 or 60 feet apart.

The witness Fox who was riding with Bentley at the time of the accident told a different story. He stated that he was riding with Bentley and they had been traveling 40 and 45 miles an hour previous to the collision; that Bentley's car collided with a car that was off the road; that the two outside wheels were off the road; that the automobile must have been south of them and going just opposite to them; that plaintiff was trying to get her automobile back onto the road; that the front wheels jumped off the pavement and the back wheels got back on the pavement and started to skid right in front of defendant's car; that when plaintiff's car started to skid in front of them defendant's car was on the right side of the road; that defendant's car was not at any time across the black line of the road.

front end of his car hit the side of plaintiff's automobile and that immediately after the collision both automobiles were been on the right side of the road; that when he first observed plaintiff's automobile his speed was from 35 to 40 miles an hour and plaintiff was driving about 35 miles an hour.

Defendant Bentley further testifying stated that the automobile he was driving was a passenger automobile and that when he was on his own business he paid for the gas and upon on the company's business the company paid for the gas; that he was returning from a trip to Wisconsin where he had been to look at some farm lands; that when he first saw plaintiff's automobile it was about 300 feet in front of him; that he did not in any fleeting while he was in Wisconsin; that when he first saw plaintiff's automobile he kept going on, but that when he saw them trying to get back on the road he started applying his brakes; that the effort to get back on the road was made when the two automobiles were about 30 or 40 feet apart.

The witness Fox who was riding with Bentley at the time of the accident told a different story. He stated that he was riding with Bentley and they had been travelling 40 and 45 miles an hour previous to the collision; that Bentley's car collided with a car that was off the road; that the two outside wheels were off the road; that the automobile must have been south of them and going just opposite to them; that plaintiff was trying to get her automobile back onto the road; that the front wheels jumped off the pavement and the back wheels got back on the pavement and started to skid right in front of defendant's car; that when plaintiff's car started to skid in front of them defendant's car was on the right side of the road; that defendant's car was not at any time across the black line of the road.

If, as the witness Fox stated, that plaintiff was trying to get her automobile back on to the road and the two front wheels were off the road and the back wheels got back on the pavement plaintiff's car was evidently facing east and the rear of her car was to the west.

While the case was on trial apparently a great deal of confusion was created by reason of the almost continuous irrelevant remarks by one of counsel. Instead of a calm investigation as to the facts, the record shows evident intent by certain counsel in the case to dominate the proceedings which, not being restrained by the court, had doubtless a very prejudicial effect on the jury. Defendants should not have been permitted to obtain an advantage in that manner. In addition to that an unusual situation presented itself. Fox, who was the principal witness for the defense, was also the plaintiff in another suit endeavoring to recover from these same defendants for the injuries which he received as the result of the collision which is the basis of the instant case. When counsel for plaintiff attempted to show by the allegations of the witness's declaration and affidavit to sue as a "poor person" in his suit against the same defendants, and by his deposition in which he stated the almost opposite to his testimony in the instant case, he was met with a barrage of objections on behalf of the defendant which caused the court to make erroneous rulings. The court sustained objections to many of the impeaching questions, which we will not recite at length, which were very prejudicial to the plaintiffs. The court commented on the evidence in the presence of the jury in several instances which should not have been done as it placed a restriction on the plaintiffs in getting competent evidence before the jury.

Without passing upon the question as to errors committed in the court's refusal to permit certain documents such as the

If, as the witness for defense, the plaintiff was trying to get her automobile back on to the road and the two front wheels were off the road and the back wheels got back on the pavement plaintiff's car was evidently facing east and the rear of her car was to the west.

While the case was on trial apparently a great deal of confusion was created by reason of the almost continuous irrelevant remarks by one of counsel. Instead of a fair investigation as to the facts, the record shows evident intent by certain counsel in the case to dominate the proceedings which, not being restrained by the court, had doubtless a very prejudicial effect on the jury. Defendants should not have been permitted to obtain an advantage in that manner. In addition to that an unusual situation presented itself. For, the wife the principal witness for the defense, was also the plaintiff in another suit seeking to recover for the injuries from these same defendants which he received as the result of the collision which is the basis of the instant case. When counsel for plaintiff attempted to show by the allegations of the witness's declaration and affidavit to use as a "prior version" in his suit against the same defendants, and by his description in which he stated the almost opposite to his testimony in the instant case, he was met with a barrage of objections on behalf of the defendant which caused the court to make erroneous ruling. The court sustained objections to many of the impeaching questions, which we will not recite at length, which were very prejudicial to the plaintiff. The court commented on the evidence in the presence of the jury in several instances which should not have been done as it placed a restriction on the plaintiff in getting competent evidence before the jury.

Without passing upon the question as to errors committed in the court's refusal to permit certain documents such as the

declaration, the deposition or the affidavit to sue as a pauper, to be introduced in evidence, sufficient error was committed by the court in its rulings as to the admission of other evidence and the refusal of permission to cross-examine, to satisfy us that the plaintiffs were not permitted to fairly present their case to the jury. As doubtless, the errors which were committed can be cured at the next hearing of this cause, it is unnecessary for us to make further comment at this time.

We are of the opinion that justice demands that a new trial be had where a fair presentation of competent evidence without error may be submitted for consideration.

For the reasons herein given the verdicts and judgments of the Circuit Court as to the two defendants, are hereby reversed and the cause is remanded for a new trial.

JUDGMENTS REVERSED AND CAUSES REMANDED.

HEBEL, P.J., AND HALL, J., CONCUR.

solicitation, the deposition of the witness to not to a lawyer, to be interested in evidence, sufficient error was committed by the court in its rulings as to the admission of other evidence and its refusal of restriction to cross-examine. In view of the fact that the plaintiffs were not permitted to fairly present their case to the jury. As indicated, the errors which were committed can be cured at the next hearing of this cause, it is unnecessary for us to make further comment at this time.

In one of the opinion that justice demands that a new trial be had where a fair presentation of competent evidence without error may be submitted for consideration.

For the reasons herein given the verdicts and judgments of the circuit court as to the two defendants, are hereby reversed and the cause is remanded for a new trial.

Reversed and remanded for further proceedings.

BRETT, J.A. AND BAIL, J. CONCUR.

39753

SERGEANT, MITCHELL & MATHIS, INC., a corporation,

Appellant,

v.

MAVAR FISH & OYSTER COMPANY, a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

295 I.A. 619

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

On July 21, 1936, Sergeant, Mitchell & Mathis, Inc., filed its complaint in chancery in the Superior Court against the defendant Mavar Fish & Oyster Company, a corporation, praying that an accounting be had between plaintiff and defendant relative to commissions alleged to be due and that plaintiff have judgment or decree against the defendant for the money so due to it or in the alternative that the court require said defendant to give to it each month a detailed statement of the amount of business transacted with customers procured by plaintiff for defendant, and to account to plaintiff as they accrue and for judgment against defendant for $15,000.00 pursuant to a contract theretofore entered into. A motion to quash the service of summons was submitted to the court upon motion and counter-affidavit thereto and the argument of counsel. The court sustained the motion and quashed the service of process, from which defendant appeals.

Summons was issued and served July 21, 1936, and on September 2, 1936, defendant filed its personal limited appearance.

The motion of defendant-appellee filed on September 11, 1936, to quash service of summons alleges that the sole and only purpose of contesting the jurisdiction of the court over its person, moves to quash the service of summons purported to have been made upon it, claiming that it is a corporation duly organized and existing

EXCELSIOR, AUTOMOBILE & MOTOR, INC.,
a corporation,

appellant,

v.

SAVAN PIER & OYSTER COMPANY,
a corporation,

appellee.

295 I.A. 619

EX. JUSTICE WALLS A. MALLORY DELIVERED THE OPINION OF THE COURT:

On July 21, 1926, Excelsior, Automobile & Motor, Inc., filed its complaint in error in the Superior Court against the defendant Savan Pier & Oyster Company, a corporation, praying that an accounting be had between plaintiff and defendant relative to commissions alleged to be due and that plaintiff have judgment or decree against the defendant for the money so due to it or in the alternative that the court require said defendant to give to it such such a detailed statement of the amount of business transacted with customers procured by plaintiff for defendant, and to account to plaintiff as they shall prove and for judgment against defendant for $15,000.00 pursuant to a contract therefore entered into. A motion to quash the service of summons was submitted to the court upon motion and counter-affidavit thereto and the argument of counsel. The court sustained the motion and quashed the service of process, from which defendant appeals.

Summons was issued and served July 21, 1926, and on September 3, 1926, defendant filed its personal limited appearance.

The motion of defendant-appellee filed in September 1926, to quash service of summons alleges that the sole and only purpose of contesting the jurisdiction of the court over the person, moves to quash the service of summons purported to have been made upon it, claiming that it is a corporation duly organized and existing

under and by virtue of the laws of the State of Louisana, with its principal place of business in Biloxi, Mississippi; that it does not have any office or place of business in the State of Illinois and that it did not and does not reside in and was not found in said State of Illinois; that it was not served with process in said State of Illinois and that at the time suit was commenced and prior thereto, has resided in the City of Biloxi, Mississippi and the City of New Orleans, Louisana; that it is a corporation whose legal and actual situs is in the States of Louisiana and Mississippi and not elsewhere; that prior to, at, and continuously since the commencement of this suit, said corporation has transacted no business in the State of Illinois, except that said corporation has made shipments of goods in interstate commerce to merchants in the State of Illinois.

Said motion further alleges that none of its officers, directors, clerks or agents, at the time of or since the commencement of this suit resided in the State of Illinois, nor has any of them any place of business there; that it has not authorized any agent, officer clerk, attorney or counselor to appear for it in this suit except for the special purpose of objecting to the jurisdiction of this Court; that John Mavar, Jr., on whom process in this cause was served, was the Vice President of said corporation and that at the time of said attempted service upon said corporation through him, he was casually and temporarily in the State of Illinois; that said John Mavar, Jr. was not then and there authorized to represent it as an officer, agent or otherwise, to receive service of legal process; that said John Mavar, Jr. has not resided nor has he a place of business or any office in said State of Illinois and that said corporation was not served with any other process, or in any manner other than as hereinabove set forth.

It appears from the counter-affidavit which was filed by

under and by virtue of the laws of the state of Louisiana, with its principal place of business in Miami, Florida; that it does not have any office or place of business in the State of Illinois and that it did not and does not reside in and was not found in said State of Illinois; that it was not served with process in said State of Illinois and that it the time suit was commenced and prior thereto, has resided in the City of Miami, Florida and the City of New Orleans, Louisiana; that it is a corporation whose legal and actual office is in the State of Louisiana and Florida and not elsewhere; that prior to, at, and continuously since the commencement of this suit, said corporation has transacted no business in the State of Illinois, except that said corporation has made shipments of goods in interstate commerce to merchants in the State of Illinois.

Said motion further alleges that none of its officers, directors, clerks or agents, at the time of or since the commencement of this suit resided in the State of Illinois, nor has any of them any place of business there; that it has not authorized any agent, officer, clerk, attorney or counselor to appear for it in this suit except for the special purpose of objecting to the jurisdiction of this Court; that John Ryan, Jr., on whom process in this cause was served, was the Vice President of said corporation and that at the time of said attempted service upon said corporation through him, he was casually and temporarily in the State of Illinois; that said John Ryan, Jr. was not then and there authorized to represent it as an officer, agent or otherwise, to receive service of legal process; that said John Ryan, Jr. has not resided nor has he a place of business or any office in said State of Illinois and that said corporation was not served with any other process, or in any manner other than as hereinabove set forth.

It appears from the counter-affidavit which was filed by

plaintiff on the motion of defendant to quash the return of summons, that the cause of action arises by virtue of a contract between plaintiff and defendant, whereby plaintiff acted as a broker, factor, or commission agent in selling the products of the defendant company in Chicago and surrounding territory; that the dispute having arisen as to the terms of the contract and the payments to be made thereunder, John Mavar, Jr., Vice President of the defendant company, came to the City of Chicago for the purpose ofsettling the dispute, at which time he was served with summons in the above entitled cause; that when the said John Mavar, Jr. was in Chicago, he was not casually or temporarily in the State of Illinois, but was in said city representing the Mavar Fish & Oyster Company as its duly authorized officer and agent; that the cause of action arose within the State of Illinois and that the transactions occurred within the State of Illinois.

Prior to the filing of the brief of appellee, motion was made upon affidavit to dismiss the appeal in this court, which was reserved on the ground that it is not an appealable order and was reserved for a final hearing.

The first question for us to determine, is: Has this court jurisdiction of this appeal? In other words, where the service or return on a summons is quashed, is it such a final order as permits an appeal to this court under the statute?

The trial court heard no evidence on the issues made and even if the court was right in its decision it did not abate the suit after its decision to quash the service. This leaves the suit still pending in the Superior Court and also with an appeal pending in this court. Ill. Rev. Stats. 1937, Chap. 110, Par. 141, Sec. 17, sets forth the method of service on private corporations and Par. 132, Sec. 8 of the same chapter entitled, "Venue-Corporations", provides that civil actions may be commenced against any corporation in the

plaintiff on the motion of defendant to quash the return of summons, that the court of motion erred by virtue of a contract between plaintiff and defendant, whereby plaintiff acted as a broker, factor, or commission agent in selling the products of the defendant company in Chicago and surrounding territory; that the figures having taken as to the terms of the contract and the royalties to be paid thereunder, John Harvey, Jr., Vice President of the defendant company, came to the City of Chicago for the purpose of settling the dispute, at which time he was never sued in accordance in the above entitled cause; that when the suit was served, Jr. was in Chicago, he was not personally or temporarily in the state of Illinois, but was in well city representing the Harvey Film & Paper Company as the duly authorized officer and agent; that the venue of suitor cause within the state of Illinois and that the transactions occurred within the state of Illinois.

Prior to the filing of the brief of counsel, motion was made upon affidavit to dismiss the appeal in this court, which was received on the ground that it is not an appealable order but was reserved for a final hearing.

The first question for us to determine, is: Has this court jurisdiction of this appeal? In other words, does the service or return on a summons in question, is it such a final order as permits an appeal to this court under the statute?

The trial court heard no evidence on the issues made and even if the facts are right in the petition it did not lend the suit after its decision to quash the service. This leaves the suit still pending in the superior court and also with an appeal pending in this court. 111. App. 494, 197, Ann. 110, App. 141, Ann. 17, 94 Ill. App. 5 of the same character entitled, "Home-Correspondence", providing that civil suitors may be summoned against any corporation in the

county "in which the transaction or some part thereof occurred out of which the cause of action arose". The affidavit of plaintiff shows that the cause of action arose out of the transactions which occurred within this state and county.

Supporting this position is Whalen v. Twin City Barge & Gravel Co., 280 Ill. App. 598, certiorari being denied by the Supreme Court.

In the instant case, even if the petition were sufficient and alleged enough facts to justify the court in taking action, no proof was offered by defendant to support its petition.

A motion was made by appellee in this court in apt time to dismiss the suit here for the reason that no final order had been entered by the trial court. Consequently, this court does not have jurisdiction to dispose of this case. Under the statutes of this state, appeals will lie to the Appellate Court and judgments, decrees or orders are final only when it terminates the litigation between the parties on the merits of the cause. Ill. Rev. Stats. 1937, chap. 110, Par. 201, Sec. 77, which reads as follows:

> 201. § 77. (JUDGMENTS, DECREES AND ORDERS SUBJECT TO REVIEW - LEAVE TO APPEAL.) (1) Appeals shall lie to the Appellate or Supreme Court, in cases where any form of review may be allowed by law, to review the final judgments, orders or decrees of the Circuit Courts, the Superior Court of Cook County, the County Courts, the City Courts and other courts whose judgments, orders and decrees are reviewable therein, under such limitations and conditions as may be imposed by law and subject to such rules of court as may be established and promulgated under this chapter. * * *"

In the case of The People v. Fisher, 335 Ill. 406, at page 411, Mr. Justice DeYoung said:

> "The court correctly decided that there was no appeal from the order vacating the decree. The right of appeal is created by statute, and in the absence of statutory authority therefor an interlocutory order entered in the progress of a cause is not appealable and may be reviewed only upon an appeal from the final order, judgment or decree. An order, judgment or decree is final only when it terminates the litigation between the parties on the merits of the case. The order from which

county "in which the transaction or some part thereof occurred out of which the cause of action arose". The affidavit of plaintiff shows that the cause of action arose out of the transaction which occurred within this county and county.

Supporting this position is Dalton v. Chin City Nurse & Travel Co., 180 Ill. App. 358, conditions being denied by the superior Court.

In the instant case, even if the petition were sufficient and alleged enough facts to justify the court in taking action, no proof was offered by defendant to support the petition.

A motion was made by appellant in this court in aid thereof to dismiss the suit here for the reason that no final order had been entered by the trial court. Consequently, this court does not have jurisdiction to dispose of this case. Under the statutes of this state, appeals will lie to the Appellate Court and judgments, decrees or orders are final only when it terminates the litigation between the parties on the merits of the cause. Ill. Rev. Stats. 1957, Chap. 110, par. 101, Sec. 77, which reads as follows:

> Sec. § 77. (Jurisdiction - Appeals to Appellate Court - Appeals to Supreme Court.) (1) Appellate Court. The Appellate Court, in such order as may be allowed by law, to review the final judgments, orders or decrees of the circuit courts, the superior courts of Cook County, the Cook County Court, the city courts and other courts whose jurisdiction and proceedings are reviewable therein, under such limitations and conditions as may be imposed by law and subject to such rules of court as may be established and promulgated under this chapter. * * *

In the case of The People v. Kinney, 320 Ill. 106, at page 111, 20, Justice McKinney said:

> "The court correctly decided that there was no appeal from the order vacating the decree. The right of appeal is created by statute, and in the absence of statutory authority therefor an interlocutory order entered in the progress of a cause is not appealable and may be reviewed only upon an appeal from the final order, judgment or decree. An order, judgment or decree is final only when it terminates the litigation between the parties on the merits of the case. The order from which

the relator sought an appeal determined nothing concerning the merits of the controversy. It was merely interlocutory and no statute authorized an appeal from the order. Jenkins & Reynolds Co. v. Wells, 220 Ill. 482; Rosenthal v. Board of Education, 239 id. 29; People v. Village of Niles Center, 308 id. 145."

The trial court, contrary to the provisions of the statute and decisions of this court as well as the Supreme Court, apparently entered an order quashing the return of service on the summons and nothing else. It was not a final order in the sense of the statute, but merely a interlocutory order and did not dispose of the law suit. Therefore, it being a mere interlocutory order without right to appeal under the statute, this court is without jurisdiction to consider the same. However, we are constrained to say under the authority of Prudential Ins. Co. v. Richman, 364 Ill. 234, the trial court erred in quashing the service of summons, but the cause having been improperly brought before us on appeal, we must dismiss the appeal.

For the reasons herein given the appeal is dismissed.

APPEAL DISMISSED.

HEBEL, P.J. AND HALL, J. CONCUR.

the relator sought an alleged determined nothing concerning the merits of the controversy. It was merely interlocutory and no statute authorized an appeal from the order. Martin v. Reynolds G. v. Reid, 120 Ill. 492; Sunnyside v. Board of Commissioners, 137 Ill. 29; Lucas v. Village of Alden Center, 138 Id. 14."

The trial court, contrary to the provisions of the statute and decisions of this court as well as the Supreme Court, apparently entered an order granting the return of service on the summons and nothing else. It was not a final order in the cause of the action, but merely a interlocutory order and did not dispose of the law suit. Therefore, it being a mere interlocutory order without right to appeal under the statute, this court is without jurisdiction to consider the case. However, we are constrained to by under the authority of Prudential Ins. Co. v. Hickman, 264 Ill. 474, the trial court erred in quashing the service of summons, but the cause having been improperly brought before us on appeal, we must dismiss the appeal.

For the reasons herein given the appeal is dismissed.

FINAL DISMISSED.

MCBRIDE, P.J. AND MILL, J. CONCUR.

39838

CITY OF CHICAGO, a municipal corporation,

Appellee,

v.

SCOTT PETERSON CORPORATION, a corporation,

Appellant.

36-A

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

295 I.A. 620[1]

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury, the defendant Scott Peterson Corporation was found guilty of violating the provisions of Sections 2964 and 2976 of the Revised Municipal Code and the Municipal Court assessed a fine of $50.00 against said defendant, from which it appeals.

Plaintiff's claim charged the defendant with having in its possession on December 30, 1936, with the intention of selling or offering for sale, food (breakfast sausage) which was impure, unwholesome and adulterated by the addition of sulphur dioxide, in violation of Sections 2964 and 2976 of the Revised Code of Chicago.

Plaintiff's theory is that the defendant by selling or having in its place of business and offering for sale, breakfast sausage which, upon analysis, was found to contain 135 milligrams of sodium sulphite per kilogram of sausage (the proportion of sulphite to meat being approximately 1 to 8000) violated the provisions of Section 2976 of the Municipal Code of Chicago which prohibits the sale or offering for sale of any food product which is impure, unwholesome or adulterated or to which any harmful or injurious foreign substance has been added.

Defendant's contention is that in making breakfast sausage, it used only fresh meat and as one of the original ingredients, sodium sulphite in the proportion approximately as found in the sample picked up at the defendant's place of business and analyzed by plain-

CITY OF CHICAGO, a municipal corporation,

Appellee,

v.

SCOTT DRUGGING CORPORATION, a corporation,

Appellant.

Municipal Court

of Chicago.

295 I.A. 620

Mr. JUSTICE MAGILL E. MCGIVERN delivered the opinion of the court.

In a trial before the court without a jury, the defendant Scott Drugging Corporation was found guilty of violating the provisions of Sections 2372 and 2373 of the revised Municipal Code and the Municipal Court assessed a fine of $50.00 against said defendant, from which it appeals.

Liability's claim charges the defendant with having in its possession on December 22, 1954, with the intention of selling or offering for sale, food (breakfast sausage) which was impure, unwholesome and adulterated by the addition of sodium nitrite, in violation of Sections 2371 and 2372 of the revised Code of Chicago.

Liability's theory is that the defendant by selling or having in its place of business and offering for sale, breakfast sausage which, upon analysis, was found to contain 120 milligrams of sodium nitrite per kilogram of sausage (the proportion of nitrite to meat being approximately 1 to 8000) violated the provisions of Section 2372 of the Municipal Code of Chicago which prohibits the sale or offering for sale of any food product which is impure, unwholesome or adulterated or to which any harmful or injurious foreign substance has been added.

Defendant's contention is that in making breakfast sausage, it used only fresh meat and as one of the original ingredients, sodium nitrite in the proportion approximately as found in the sample picked up at the defendant's place of business and analyzed by plain-

tiff's chemist - that is, 125 milligrams to 1 kilogram (that proportion being 1 part sulphite to 8000 parts of meat and other ingredients); that sodium sulphite is included among other ingredients to preserve the freshness and color of the product and to prevent therein the formation of harmful bacteria.

Much space has been devoted in plaintiff's brief to an argument in support of a motion to dismiss the appeal of defendant, which motion to dismiss has not been made in this court. The appellee joined issue here by filing its briefs and thereby waived any questions as to dismissal.

There was offered in evidence Regulation No. 18 of the United States Department of Agriculture, effective November 1, 1922, which explains the rules and standards of the United States pharmacopoeia referred to in the ordinance which reads as follows:

> "Section 6, Paragraph No. 1: No meat or product shall contain any substance which impairs its wholesomeness, nor contain, except as permitted by paragraphs 2, 3, and 8 of this section, any dye, preservative or added chemical.
> Paragraph No. 2: There may be added to meat and products common salt, sugar, wood, smoke, cider vinegar, wine vinegar, malt vinegar, sugar vinegar, glucose vinegar, spirit vinegar, pure spices, salt peter, and nitrate of soda. Benzoate of soda may be added to meat and products only when declared on the label, as provided by paragraph 11, section 9 of regulation 17."

At the trial plaintiff offered in evidence section 2976 of the Revised Chicago Code, which reads as follows:

> "2976. Impure or adulterated water, drugs or food.) Any person, firm or corporation, or any agent or employe thereof, who shall keep for sale, offer for sale or exchange, or shall sell or deliver or expose for sale, any drugs not conforming to the rules and standards of the United States pharmacopoeia, or any water or liquids or food which shall be impure, unwholesome or adulterated, or to which any harmful or injurious foreign substance has been added, shall be fined not less than five dollars nor more than one hundred dollars for each first offense, and for each subsequent offense not less than fifty dollars nor more than two hundred dollars."

tiff's counsel - that is, his allusions to a liquor (that proportion being 1 part malvoisie to 1000 parts of must and other ingredients); that wording malvoisie is included among other ingredients to preserve the freshness and color of the product and to prevent therein the formation of harmful bacteria.

Much space has been devoted in plaintiff's brief to an argument in support of a motion to dismiss the appeal of defendant, which motion to dismiss has not been made in this court. The question joined issue here by filing its briefs and answering oral questions as to dismissal.

There was offered in evidence Regulation 8a, 18 of the United States Department of Agriculture, effective December 1, 1933, which explains the rules and standards of the United States Pharmacopoeia referred to in the ordinance which reads as follows:

"Section 4, Paragraph 8a. 1: To wine or product shall contain any substance which imparts its wholesomeness, nor contain except as permitted by paragraphs 2, 3, and 5 of this section, any dye, preservative or added chemical.

Paragraph 8a. 2: There may be added to wine and products commonly sold, sugar, wood, acids, cider vinegar, wine vinegar, malt vinegar, sugar vinegar, glucose vinegar, spirit vinegar, pure spices, salt peter, and nitrite of soda. Carbonate of soda may be added to wine and products only when declared on the label, as provided by paragraph 12, section 8 of regulation IV."

At the trial plaintiff offered in evidence section 2474 of the Revised Ordinance, which reads as follows:

"2474. Impure or adulterated water, image or food.) Any person, firm or corporation, or any agent or employe thereof, who shall keep for sale, offer for sale or exchange, or shall sell or deliver or expose for sale, any drugs not conforming to the rules and standards of the United States Pharmacopoeia, or any water or liquids or food which shall be impure, unwholesome or adulterated, or to which any harmful or injurious foreign substance has been added, shall be fined not less than five dollars nor more than one hundred dollars for each first offense, and for each subsequent offense not less than fifty dollars nor more than two hundred dollars."

There is no controversy as to the facts. It is agreed that the defendant manufactured the sausage and in the course of its manufacture added the sodium sulphite to the meat used. Chemicals such as sulphur dioxide and sodium sulphide are derived from sulphuric acid and are chemicals which are excluded from meat by the United States regulation to which the ordinance refers. If the ordinance by its terms excludes a certain article, defendant is bound by its terms.

Without passing upon the wisdom or necessity of such ordinance, we might call attention to the testimony of a witness, a professor of chemistry, called on behalf of defendant, wherein he states:

> "The use of 125 milligrams of sodium sulphite to one kilogram could never be harmful to a normal individual. Persons who are about to die, it might speed up death a bit. It could be harmful in nephritis. Could be harmful to a person who had kidney trouble."

The facts having been admitted and the ordinance being plain, the court was fully justified in finding in favor of plaintiff and against defendant. Therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

There is no controversy as to the facts. It is agreed that the defendant manufactured the sausage and in the course of its manufacture added the sodium nitrite to the meat used. Chemicals such as sulfuric dioxide and sodium nitrite are derived from sulfuric acid and are chemicals which are excluded from meat by the United States regulation to which the ordinance refers. If the ordinance by its terms excludes a certain article, government is bound by its terms.

Without resting upon the wisdom or necessity of such ordinance, or right will attention to the testimony of a witness, a professor of chemistry, called on behalf of defendant, shows in evidence:

> "The use of 125 milligrams of sodium nitrite to one kilogram could never be harmful to a normal individual. Persons who are about to die, it might speed up death a bit. It could be harmful in moderate. Could be harmful to a person who had kidney trouble."

The facts having been admitted and the ordinance being clear, the court was fully justified in finding in favor of plaintiff and against defendant. Therefore, the judgment of the municipal Court is affirmed.

JUDGMENT AFFIRMED.

MEANS, P.J. AND KAIL, J. CONCUR.

39860

VICTORIA ELLINGER, by JOHN ELLINGER, her father and next friend, (Plaintiff) Appellee, v. ASTRID M. PAULSON, (Defendant) Appellant, and EDWARD A. HOLSTEIN, (Defendant).	APPEAL FROM SUPERIOR COURT COOK COUNTY.

37 A

295 I.A. 620

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Superior Court for the sum of $15,000.00 in favor of Victoria Ellinger by John Ellinger, her father and next friend, plaintiff-appellee, and against Astrid M. Paulson, defendant-Appellant, rendered in an action to recover damages for personal injuries alleged to have been sustained by plaintiff while she was riding as a passenger in an automobile driven by defendant Astrid M. Paulson.

It is claimed in the first count of the complaint that the automobile, which was driven by defendant Paulson and in which plaintiff was riding as a passenger, through the negligence of Paulson collided with another automobile driven by one Edward A. Holstein, who was also named as a defendant; that the collision of the two automobiles occurred at the intersection of Kenneth and Leland avenues in the City of Chicago.

The second count charged the defendants Paulson and Holstein with wilful and wanton misconduct in so driving their automobiles that a collision occurred injuring said plaintiff whilst in the exercise of due care for her safety.

The cause came on for trial before a jury which returned separate verdicts, one finding the defendant Holstein not guilty and the other finding the defendant Astrid M. Paulson guilty and assessing

VICTORIA WILLMOTT, by JOHN GILLMOTT,
her father and next friend,

(Plaintiff) Appellee,

v.

DAVID E. PARSONS,

(Defendant) Appellant,

and

EDWARD J. WOLFSKIL, (Defendant).

COOK COUNTY.

MR. JUSTICE DUFFY E. MULLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Superior Court for the sum of $16,000.00 in favor of Victoria Willmott by John Willmott, her father and next friend, plaintiff-appellee, and against David E. Parsons, defendant-appellant, rendered in an action to recover damages for personal injuries alleged to have been sustained by plaintiff while she was riding as a passenger in an automobile driven by defendant Edward E. Parsons.

It is claimed in the first count of the complaint that the automobile, which was driven by defendant Parsons and in which plaintiff was riding as a passenger, through the negligence of Parsons collided with another automobile driven by one Edward J. Roberts, who was also named as a defendant; that the collision of the two automobiles occurred at the intersection of Lunden and Island avenues in the City of Chicago.

The second count charged the defendants Parsons and Roberts with wilful and wanton misconduct in so driving their automobiles that a collision occurred injuring said plaintiff while in the exercise of due care for her safety.

The cause came on for trial before a jury which returned separate verdicts, one finding the defendant Roberts not guilty and the other finding the defendant David E. Parsons guilty and assessing

plaintiff's damages at the sum of $15,000.00 as heretofore stated. On the trial the court submitted to the jury on behalf of plaintiff a special interrogatory with regard to plaintiff's case against the defendant Paulson, which reads as follows:

> "Do you find from a preponderance of the evidence that the defendant Astrid M. Paulson drove her automobile wilfully and wantonly at the time and place of the collision in question and that such wilful and wanton misconduct of the defendant, Astrid M. Paulson, contributed to the injuries of the plaintiff?"

This interrogatory was answered in the affirmative.

The court also submitted at the request of the defendant Paulson, the following interrogatory:

> "Do you find that the plaintiff was riding with the defendant, Astrid M. Paulson, as her guest?"

The jury answered in the negative.

The answers of the defendants while admitting the accident as to time and place, denied the charges of negligence and wilful and wanton conduct and all the other charges of wrongdoing.

Plaintiff's theory of the case according to count one of her complaint seems to be that she was riding as a passenger in the automobile of the defendant Astrid M. Paulson and while in the exercise of ordinary care for her own safety said automobile so driven collided with an automobile driven by Edward A. Holstein and plaintiff was injured.

Plaintiff's theory as set forth in count two of the complaint appears to be that plaintiff was injured as aforesaid, and further charges that the defendant Astrid M. Paulson with wilful and wanton conduct in driving said automobile.

Defendant Paulson's theory of the case appears to be that the plaintiff at the time of the occurrence complained of was riding as her (Paulson's)guest in her automobile; that plaintiff has neither alleged nor proven any other relationship; that plaintiff is not entitled to recover from the defendant Paulson under count one of the complaint and that the defendant Paulson was not guilty of any wilful

plaintiff's damages at the sum of $15,000.00 as hereinafore stated.

On the trial the court submitted to the jury on behalf of plaintiff a special interrogatory with regard to plaintiff's sole against the defendant Paulson, which reads as follows:

> "Do you find from a preponderance of the evidence that the defendant Astrid K. Paulson drove her automobile wilfully and wantonly at the time and place of the collision in question and that such wilful and wanton misconduct of the defendant, Astrid K. Paulson, contributed to the injuries of the plaintiff?"

This interrogatory was answered in the affirmative.

The court also submitted at the request of the defendant Paulson, the following interrogatory:

> "Do you find that the plaintiff was riding with the defendant, Astrid K. Paulson, as her guest?"

The jury answered in the negative.

The answers of the defendants while admitting the accident as to time and place, denied the charges of negligence and wilful and wanton conduct and all the other charges of wrongdoing.

Plaintiff's theory of the case according to count one of her complaint seems to be that she was riding as a passenger in the automobile of the defendant Astrid K. Paulson and while in the exercise of ordinary care for her own safety this automobile so driven collided with an automobile driven by Edward A. Roberts and plaintiff was injured.

Plaintiff's theory as set forth in count two of the complaint appears to be that plaintiff was injured as aforesaid, and further charges that the defendant Astrid K. Paulson with wilful and wanton conduct is driving said automobile.

Defendant Paulson's theory of the case appears to be that the plaintiff at the time of the occurrence complained of was riding as her (Paulson's) guest in her automobile; that plaintiff has neither alleged nor proven any other relationship; that plaintiff is not entitled to recover from the defendant Paulson under count one of the complaint and that the defendant Paulson was not guilty of any wilful

and wanton misconduct which caused the accident in question or contributed to the plaintiff's alleged injuries, and that plaintiff cannot recover because of the so-called "Guest" statute of this State.

The evidence in this case, concerning which there seems to be no dispute, shows that the injury was occasioned by the collision of the automobiles of the two defendants at the corner of Kenneth and Leland avenues in the City of Chicago.

At the time of the entry of the judgment on the verdict for $15,000.00, the court vacated and set aside the finding of the jury to the special interrogatory, in which the jury was asked to find whether or not the defendant Astrid M. Paulson drove her automobile wilfully and wantonly and that the wilful and wanton misconduct of the defendant Paulson contributed to the injury to the plaintiff, as being contrary to the manifest weight of the evidence. xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Many points are raised by appellant alleging errors and directs our attention to one of the instructions given on behalf of plaintiff, which is an instruction directing a verdict and reads as follows:

> "The Court instructs the jury that if they find from a preponderance of the evidence under Count Two of the Complaint herein:
>
> (1) That the plaintiff was at the time and place of the collision in question, riding in the automobile of the defendant, Astrid M. Paulson;
>
> (2) That then and there the defendant Astrid M. Paulson wilfully and wantonly drove her automobile;
>
> (3) That then and there the plaintiff was injured;
>
> (4) And that the wilful and wanton misconduct of the defendant Astrid M. Paulson contributed to the injury of the plaintiff.
>
> Then you should find the defendant Astrid M. Paulson guilty."

The fault with this instruction is that in the complaint it is alleged in both counts that the plaintiff was riding as a passenger and observing due care for her own safety. These elements are not mentioned in the instruction. We are at a loss to know, as

the jury must have been, whether the plaintiff claims she was riding as a passenger, a guest, or just what the relationship between the plaintiff and the defendant was at the time of the accident. This instruction further proceeds on the theory that the defendant wilfully and wantonly drove her automobile.

The answer to the special interrogatory, in which the jury affirmatively stated that the action of the defendant was wilful and wanton, the court set aside as being against the manifest weight of the evidence. When a directory instruction such as this one is given which tells the jury to render a verdict in favor of plaintiff, it is necessary that the elements must be included in the instruction, which, if proven, would entitle the plaintiff to recover as against the defendant. The element as to plaintiff being in the exercise of care at the time of the accident, as alleged, also as to what acts were performed by the defendant, if any, which contributed to the injury are not mentioned in the instruction. In addition to this the court set aside the special finding by the jury as to wilful and wanton conduct of the defendant Paulson as against the manifest weight of the evidence, thereby eliminating the major basis of this directory instruction. We think this instruction should not have been given in such form as it unquestionably misled the jury.

As the Supreme Court said in Illinois Iron and Metal Co. v. Meber, 196 Ill. 526, 531:

> "It has always been held that where the court directs a particular verdict if the jury should find certain facts, the instruction must embrace all the facts and conditions essential to such a verdict. It is not required that one instruction shall state all the law, and instructions may supplement each other and supply defects, but where an instruction directs a verdict upon certain conditions it must state the conditions correctly."

Many other errors are assigned and points argued as to instructions given and as to the admissibility of evidence, which are of serious import, but inasmuch as such additional errors, if any, may be corrected when the cause is retried, we shall refrain from

the jury must have been, whether the plaintiff could be one riding as a passenger, a guest, or just what the relationship between the plaintiff and the defendant was at the time of the accident. This instruction further proceeds on the theory that the defendant willfully and wantonly drove her automobile.

The answer to the special interrogatory, in which the jury affirmatively stated that the actions of the defendant was willful and wanton, the court set aside on being satisfied the manifest weight of the evidence. Then a directory instruction could be this one is given which tells the jury to render a verdict in favor of plaintiff, it is necessary that the elements must be included in the instruction, which, if proven, would entitle the plaintiff to recover as against the defendant. The element as to plaintiff being in the exercise of care at the time of the accident, as alleged, also as to what acts were performed by the defendant, if any, which contributed to the injury are not mentioned in the instruction. In addition to this the court set aside the special finding by the jury as to willful and wanton conduct of the defendant relied on against the manifest weight of the evidence, thereby eliminating the major basis of this directory instruction. It thus this instruction should not have been given in such form as it unquestionably misled the jury.

In the Supreme Court held in Illinois Iron and Metal Co. v. Ulrich, 190 Ill. 376, 380:

> "It has already been held that where the court directs a verdict for verdict if the jury should find certain facts, the instruction must contain all the facts and conditions essential to such a verdict. It is not required that one instruction shall state all the law, and instructions may supplement each other and usually do, but where an instruction directs a verdict upon certain conditions it must state the conditions correctly."

Many other errors are assigned and points argued as to instructions given and as to the admissibility of evidence, which are of serious import, but inasmuch as such additional errors, if any, may be corrected when the cause is retried, we shall refrain from

discussing them at this time. The cross-appeal of the appellee to the action of the court in setting aside the jury's special finding is denied.

We think instruction 3, heretofore referred to, should not have been given and that the jury was confused thereby.

For the reasons herein given the judgment of the Superior Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, J. CONCURS
HEBEL, P.J. SPECIALLY CONCURS in the conclusion reached but not in all that is said.

discussing them at this time. The cross-examination of the witnesses to the motion of the court in striking while the jury's special finding is testing.

In this instruction I, heretofore referred to, should not have been given and that the jury was confused thereby.

For the reasons herein given the judgment of the Superior Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

KING, J. concurs.
HERRE, P.J. SPECIALIST concurs in the conclusion reached but not in all that is said.

39907

BENJAMIN G. KILPATRICK, as Successor Trustee in Trust Deed recorded as Document No. 10023393,

(Complainant,) Appellee,

v.

JOSEPH SCHMITT, et al,

(Defendants)

On Appeal of FLORENCE M. WOOLLEY, WILLIAM P. DOERR,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

295 I.A. 620[3]

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Florence M. Woolley and William P. Doerr bring this appeal from an order entered in the Superior Court on October 8, 1937, which said order they claim was entered because of the fraud and misrepresentations practiced upon the court.

It appears that on December 7, 1932, Benjamin G. Kilpatrick, successor trustee, filed his bill of complaint to foreclose the lien of a trust deed against the property located in Chicago, Illinois and known as 5510-12 Cornell avenue, which was a 50 room hotel.

It further appears that on June 3, 1936, a decree of sale was entered ordering William J. McGah, master in chancery, to sell said premises at public sale for cash, to the highest and best bidder, after first publishing notice of said sale according to the law; that after duly advertising and giving notices directed by said decree, said master in chancery held a sale on November 5, 1936, and sold said premises to one Sol Plast for $15,600 and prepared his report of sale which was filed on February 25, 1937; that prior to the filing of this report of sale one Daniel Quirk had intervened, by leave of court, and asked to be heard on objections to the sale for insufficiency and an order was entered that his attorneys be given notice of all future proceedings; that on July 7, 1937, the master's

Florence E. Woolley and William T. Ebert bring this special case on order entered in the Superior Court on October 8, 1877, which said order they claim was entered because of the fraud and misrepresentations practiced upon the court.

It appears that on December 7, 1876, Benjamin D. Elliottson, successor trustee, filed his bill of complaint to foreclose the lien of a mortgage upon the property located in Chicago, Illinois and known as 5312-14 Dorsell avenue, which was a 30 room hotel.

It further appears that on June 5, 1876, a decree of sale was entered ordering William A. Rodda, master in chancery, to sell said premises at public sale for cash, to the highest and best bidder, after first publishing notice of said sale according to the law; that after duly advertising and giving notice directed by said decree, said master in chancery held a sale on November 6, 1876, and said sale produced to one Joi Ulmer for $16,[illegible] and presented his report of sale which was filed on February 26, 1877; that prior to the filing of this report of sale one Daniel Smith had intervened, by leave of court, and asked to be heard on objections to the sale for insufficiency and he offer was entered that his attorney be given notice of all future proceedings; that on July 7, 1877, the master's

report was approved and confirmed by order of court duly entered, and the purchaser Sol Plast was directed to immediately pay the balance of the purchase price to said master in chancery.

It further appears that on July 15, 1937, Florence H. Woolley and William P. Doerr filed a petition, after due notice to attorneys of record and to the master in chancery, complainant's solicitors and solicitor for Sol Plast, to set aside said sale and vacate the order approving the sale, because the balance of the purchase price had not been paid; that this motion was entered and continued to July 19, 1937; that on the morning of July 19, 1937, Sol Plast paid the balance of the purchase price to said master in chancery and thereupon appellants moved to withdraw their petition of July 15, 1937 and it was so ordered.

It further appears that on August 6, 1937, one Helen Wells, by counsel, after due notice to all attorneys of record, filed a sworn petition alleging she was the owner of $6,000 worth of bonds secured by the Cornell Hotel property, that the premises were worth $60,000 gross, that delinquent taxes amounted to $25,000 and that a bid of $15,600 over and above the amount of delinquent taxes was inadequate, that she would bid $35,000 if the sale of November 5, 1936 was set aside and, to guarantee said bid, offered to deposit $1,000 with the master in chancery to be forfeited if she failed to make a bid of at least $35,000; that this motion was entered and continued to September 13, 1937, without further notice, and on September 13, 1937, the motion was again continued to September 17, 1937; that on September 17, 1937 the motion was continued to October 15, 1937.

It further appears that on October 8, 1937, an order which is here complained of, was entered vacating the order of July 7, 1937, approving the master's report of sale and setting aside the sale of

report was approved and confirmed by order of courts duly entered, and the purchaser bid plant was directed to immediately pay the balance of the purchase price to said master in chancery.

It further appears that on July 18, 1927, Florence C. Woolfley and William F. Doerr filed a petition, after due notice to attorneys of record and to the master in chancery, complainant's solicitors and solicitor for bid plant, to set aside said sale and vacate the order approving the sale, because the balance of the purchase price had not been paid; that this motion was entered and continued to July 19, 1927; that on the morning of July 19, 1927, bid plant paid the balance of the purchase price to said master in chancery and thereupon approximately noved to withdraw their petition of July 18, 1927 and it was so ordered.

It further appears that on August 8, 1927, one Helen Hill, by counsel, after due notice to all attorneys of record, filed a sworn petition alleging she was the owner of $3,000 worth of bonds secured by the Kendall Hotel property; that the premises were worth $60,000 gross, that delinquent taxes amounted to $58,000 and that a bid of $10,000 over and above the amount of delinquent taxes was inadequate; that she would bid $15,000 if the sale of November 8, 1926 was set aside and, to guarantee said bid, offered to deposit $1,000 with the master in chancery to be forfeited if she failed to make a bid of at least $15,000; that this motion was entered and continued to September 14, 1927, without further notice, and on September 14, 1927, the motion was again continued to September 17, 1927; that on September 17, 1927 the motion was continued to October 14, 1927.

It further appears that on October 6, 1927, an order which is here complained of, was entered vacating the order of July 7, 1927, approving the master's report of sale and setting aside the sale of

November 5, 1936; that the order purported to be entered on the petition of Helen Wells and recited that due notice had been served upon all parties in interest; that the order was marked "O.K" by solicitors for complainant and by solicitor for purchaser; that the said order of October 8, 1937, also provided that the purchase money of $15,600 should be repaid to the holder of the certificate of sale on surrender of said certificate and that said master resell said premises.

It is now claimed that the said order was not entered upon the petition of said Helen Wells, or her solicitor, but that it was entered without her knowledge or the knowledge of her solicitors. It is further claimed that although the order recites, "due notice having been served upon all parties in interest", that no notice was served on anyone and that no one knew of the motion until after the order had been entered; that instead of the order being entered upon the petition of Helen Wells, it was entered upon the motion of Maxwell Landis, a solicitor for the purchaser, Sol Plast.

It further appears that on October 13, 1937, Helen Wells, by her solicitors filed her second sworn petition, reciting that she was the holder of $6,000 of bonds, secured by the trust deed foreclosed in this cause, that the property was said "Cornell Hotel", that the sale had been held November 5, 1936, that Sol Plast was the successful bidder, that the sale had been approved July 7, 1937, by order duly entered, that she had filed a previous petition on August 6, 1937, after due notice to all the parties of record, asking that the sale and order approving said sale be set aside, that the hearing on said petition of August 6, 1937 had been set for September 13, 1937, continued to September 17, 1937, and then continued to October 15, 1937; that without her knowledge and consent and without notice to her or her solicitors, the solicitor for Sol Plast,

November 8, 1927; that the order purported to be entered on the petition of Helen Hale and recited that the notice had been served upon all parties in interest; that the order was signed "D.C." by solicitors for complainant and by solicitor for respondent; that the said order of October 6, 1927, also provided that the purchase money of $10,000 should be repaid to the holder of the certificate of title on surrender of said certificate and that said holder repaid said proceeds.

It is now claimed that the said order was not entered upon the petition of Helen Hale Hale, or her solicitor, but that it was entered without her knowledge or the knowledge of her solicitors. It is further claimed that although the order recites, "due notice having been served upon all parties in interest", that no notice was served on anyone and that at one time of the motion until after the order had been entered; that instead of the order being entered upon the petition of Helen Hale, it was entered upon the motion of Donald Lamie, a solicitor for the purchaser, Pui Fiat.

It further appears that on October 11, 1927, Helen Hale, by her solicitors filed her second entry petition, stating that she was the owner of $2,000 of bonds, secured by the trust deed foreclosed in this cause, that the property was sold "Donald Lord", that the sale had been held November 2, 1926, that Pui Fiat was the successful bidder, that the sale had been confirmed July 7, 1927, by order duly entered, that she had filed a previous petition on August 8, 1927, after due notice to all the parties of record, saying that the said 1st order approving said sale be set aside, that the hearing on said petition of August 8, 1927 had been set for September 12, 1927, continued to September 17, 1927, and then continued to October 11, 1927; that without her knowledge and without and without notice to her or her solicitors, the solicitor for Pui Fiat,

purchaser at the master's sale, secured the order of October 8, 1937, which reads as follows:

> "This cause coming on to be heard on the verified Petition of Helen Wells, to set aside the sale of the property involved in this cause, due notice having been served upon all parties in interest, and the Court having before it the said Petition, and being fully advised in the premises,
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of July 7, 1937, approving and confirming the Master's Report of Sale of the property involved herein be, and the same is, hereby vacated, set aside and held for nought.
>
> IT IS FURTHER ORDERED that the said sale be, and the same is, hereby set aside and the Master directed to return to Saul Plast, the purchaser, the sum of Fifteen Thousand Six Hundred Dollars,($15,600), upon the surrender by said Saul Plast, or his assignee, if any, of the Master's Certificate of Sale heretofore executed, and that the said Certificate of Sale be, and the same is hereby declared null and void and of no force and effect.
>
> IT IS FURTHER ORDERED THAT the cause be re-referred to Master in Chancery William McGah, to republish and hold another sale, in accordance with the Statutes so made and provided.
>
> ENTER:
>
> JAMES F. FARDY,
>
> Judge."

The above order was marked "O.K." by solicitors for complainant and solicitor for purchaser.

The petition further alleges that on October 8, 1937, after the entry of said order said solicitor for purchaser demanded and procured of William J. McGah, master in chancery, a check for $15,600, payable to the order of Sol Plast and Isador Combiner, assignee of said master's certificate of sale, and that on the same day and before 2 P.M., had said check certified by drawee bank; that said order was procured by the solicitor for purchaser on behalf of Sol Plast in violation of the rules of court and by a misrepresentation to the court, in that due notice was not served upon any parties in interest; that said petitioner, Helen Wells, desired to withdraw her petition filed on August 6, 1937, and asked to vacate the order of October 8, 1937; that Sol Plast be ordered to return to said master in chancery the $15,600 and that said petitioner be given leave to withdraw said petition filed August 6, 1937.

pronounced at the master's sale, entered the index of judgment 6, 1927, which reads as follows:

"This cause coming on to be heard on the verified petition of Blake Sells, by and with the sale of the property involved in this cause, and notice having been served upon all persons in interest, and the Court finding before it the said petition, and being fully advised in the premises,

It is hereby ordered, adjudged and decreed that the order of July 7, 1927, authorizing and confirming the master's report of sale of the property involved herein be, and the same is, hereby revoked, and held and held for naught.

It is further ordered that the said sale be, and the same is, hereby set aside and the master directed to return to said final fund, the purchaser, the sum of fifteen thousand six hundred dollars, ($15,600), upon the surrender by said final, or his assigns, if any, of the master's certificate of sale herein, and the said certificate of sale be, and the same is hereby declared null and void and of no force and effect.

It is further ordered that the cause be re-referred to master in chancery William Bond, to republish and hold another sale, in accordance with the statutes in such provided.

ENTER:

JOHN K. TRUST,

Judge."

The above order was signed "O.K." by solicitors for complainant and solicitor for defendant.

The petition further shows that on October 6, 1927, after the entry of said order said solicitor for purchaser discovered and proposed to William J. Bond, master in chancery, to show for $15,000, pursuant to the order of Cook Circuit and Probate Court, analogous of said master's certificate of sale, and that he the said day and before C.J.M., had said same certified by Grover Bond; that said order was presented by the solicitor for purchaser on behalf of the final in substitution of the value of court and by a disappointment in the court, in this due notice was not served upon any parties in interest; that said petitioner, Blake Sells, desired to withdraw her petition filed on August 8, 1927, and asked to vacate the order of October 6, 1927; that the final be ordered to return to said master in chancery the $15,000 and that said petitioner be given leave to withdraw said petition filed August 8, 1927.

It further appears that on the presentation of said petition of said Helen Wells and without any answers being filed thereto, and without any denial of the allegations therein, the court entered an order denying said petition. No complaint is made by Helen Wells of the court's action.

It further appears that on October 20, 1937, appellants here filed their sworn petition, alleging ownership of 13/16thsof the fee title of said Cornell Hotel and the chain of title back to the common grantors, Joseph Schmitt and his wife; that the legal title to the remaining undivided 3/16ths is held by Florence Woolley, one of appellants, in fee for the use and benefit of one Esther H. Levy; that pursuant to decree of sale the premises were sold by the master in chancery to Sol Plast for $15,600, and the master's report of sale was filed and approved July 7, 1937; that on August 6, 1937, one Helen Wells by intervening petition alleged the property to be worth $60,000, the delinquent taxes $25,000 and offered to bid $35,000 over and above the taxes, and offered to deposit $1,000 to guarantee her bid if the court would set aside said sale, which petition was continued from time to time, finally being set for hearing on October 15, 1937,

Appellants' petition further alleges that the solicitor of record for Sol Plast was the bidder at the sale; that without notice to anyone except solicitor for complainant, he procured the entry of the order of October 8, 1937, vacating the order approving the sale and vacating the sale and ordering a resale, ordering also the return of the purchase money to Sol Plast; that on the same day Maxwell Landis surrendered the certificate of sale to said master and received a check for $15,600 and immediately had the same certified by the drawee bank.

Appellants' petition further states that said order of October 8, 1937, was in violation of Rule 16 of the rules of the

It further appears that on the presentation of such petition of said Alice Mills and without any testimony being filed therein, and without any notice of the allegations therein, the court entered an order denying said petition. No exception is made by Mills unto of the court's action.

It further appears that on October 26, 1927, appellants Mills filed their sworn petition, alleging ownership of 17/18ths of the fee title of paid Dorsell hotel and the chain of title back to the common grantor, Joseph Jaquit and his wife; that the legal title to the remaining undivided 1/18th is held by Florence Dowling, one of appellees, in the fee tax and mortgagee of one Esther R. Levy; that pursuant to decree of sale the premises were sold by the master in chancery to Dal Vista for $15,000, and the master's report of sale was filed and approved July 7, 1927; that on August 8, 1927, one Mills filed by intervening petition alleged the property to be worth $80,000; that subsequent thereto $20,000 was offered to said $15,000 over and above the terms, and offered to deposit $1,000 to guarantee her bid if the court would set aside said sale, which petition was dismissed from time to time, finally being set for hearing on October 12, 1927.

Appellants' petition further alleges that the solicitor of record for Dal Vista and the master at the sale; that without notice to anyone except solicitor for complainant, he procured the entry of the order of October 8, 1927, vacating the order approving the sale and vacating the sale and ordering a resale, ordering also the return of the purchase money to Dal Vista; that on the same day Harrell Mills purchased the certificate of sale to said master and received a deed for $15,000 and immediately had the same certified by the Grange bank.

Appellants' petition further states that with order of October 8, 1927, was in violation of Rule 12 of the rules of the

Superior Court, which provides that no motion shall be heard or order entered in any cause without notice to the opposite party after such party has entered his appearance and by misrepresentation to the court and in violation of the rights of appellants.

Appellants' petition further alleges that said petition of Helen Wells was inadequate and showed no legal grounds for the vacation of the order of July 7, 1937, and that said order of October 8, 1937, was contrary to the wishes of Helen Wells as evidenced by her subsequent petition, filed October 13, 1937, asking leave to withdraw said petition of August 6, 1937.

Appellants' petition further alleges that they desire to redeem from said sale and, on October 18, 1937, tendered the sale price, plus interest at 6 per cent to the master and asked for a certificate of redemption; that the tender was refused, because the sale had been vacated; that appellants hold their tender good and are still ready to redeem.

Appellants' prayer is that the order of October 8, 1937, be vacated; that Sol Plast be directed to repay the $15,600 to said master, that the order of July 7, 1937, be reinstated, that the sale of November 5, 1936, be held valid, and that the petition of Helen Wells of August 6, 1937, be denied, that the master be directed to accept the tender of the redemption money and upon receipt of it, issue his certificate of redemption. The court denied this petition on the day it was presented.

This cause, so far as we are advised, is still pending in the Superior Court and the orders that were entered denying the prayer of the petition were merely interlocutory. No certificate of evidence was presented and we must presume that the trial court had sufficient before it to justify the action taken by said court. It

superior court, which provides that no notice shall be given of order entered in any cause without notice to the opposite party after such party has entered his appearance and by stipulations to the court and in violation of the rights of appellants.

Appellants' petition further alleges that said petition of Helen Hills was inadequate and showed no legal grounds for the vacating of the order of July 7, 1927, and that said order of October 6, 1927, was entirely in the wisdom of Helen Hills as evidenced by her subsequent petition, filed October 11, 1927, asking leave to withdraw said petition of August 8, 1927.

Appellants' petition further alleges that they desire to redeem from said sale and, on October 12, 1927, tendered the sale price, plus interest at 6 per cent in the market and asked for a certificate of redemption; that the tender was refused, because the sale had been vacated; that appellants hold their tender good and are still ready to tender.

Appellants' prayer is that the order of October 6, 1927, be vacated; that Joe Hills be directed to repay the $18,800 to said master, that the order of July 7, 1927, be reinstated, that the sale of November 8, 1926, be held valid, and that the petition of Helen Hills of August 8, 1927, be denied, that the master be directed to accept the tender of the redemption money and upon receipt of it, issue his certificate of redemption. The court denied this petition on the day it was presented.

This cause, so far as we are advised, is still pending in the Superior Court and the orders that were entered denying the prayer of the petition were merely interlocutory. No certificate of evidence was presented and we must presume that the trial court had sufficient before it to justify the action taken by said court. It

was the duty of the court to get the best price possible for this property and if in the court's discretion it appeared possible to obtain $50,000 at the sale instead of the $15,600 for which the property was sold, and the purchaser consented to this, no one could have been injured thereby, neither the bondholders nor the owners of the equity.

At the outset, however, another question is presented to us which is not mentioned in the briefs filed herein, being that of the jurisdiction of this court to entertain this appeal, which is a question that may be raised on the court's own motion. Duncanson v. Lill, 322 Ill. 528 and cases therein cited.

Under the statutes this court can only entertain appeals from final orders, judgments and decrees, except in specified cases such as injunctions and receiverships. Chapter 110, Paragraph 201, Section 77, Ill. State Bar Stats. 1937, provides:

> "201. § 77. (JUDGMENTS, DECREES AND ORDERS SUBJECT TO REVIEW - LEAVE TO APPEAL). (1) Appeals shall lie to the Appellate Court or Supreme Court, in cases where any form of review may be allowed by law, to revise the final judgments, orders or decrees of the Circuit Courts, the Superior Court of Cook County, the County Courts, the City Courts and other courts whose judgments orders and decrees are reviewable therein, * * * "

In the case of Groves v. Farmers State Bank, 368 Ill. 35, the court in describing a final order in which an appeal may lie to this court, on page 45, said:

> "The test as to whether a judgment, decree or order is final and appealable is whether it terminates the litigation on the merits of the case and determines the rights of the parties. (People v. Stony Island State Savings Bank, 355 Ill. 401). An order has the essential elements of finality when, if affirmed, the trial court has only to proceed with its execution."

It must at once be apparent that there is no element of finality in connection with these orders. The court directed the master to re-advertise and re-sell the property and whether or not

was the duty of the court to get the best price possible for this property and if in the court's discretion it appeared possible to obtain $20,000 of the sale instead of the $16,000 for which the property was sold, and the purchaser consented to this, no one could have been injured thereby, neither the bondholders nor the owners of the equity.

At the outset, however, another question is presented to us which is not mentioned in the briefs filed herein, being that of the jurisdiction of this court to entertain this appeal, which is a question that may be raised on the court's own motion. Dunnegan v. Hill, 225 Ill. 588 and cases therein cited.

Under the statutes this court can only entertain appeals from final orders, judgments and decrees, except in specified cases such as injunctions and receiverships. Chapter 110, Illinois Civ. Section 77, Ill. State Bar Stat. 1937, provides:

> "Sec. 8 77. (Appeals - Bonds - Exceptions and decisions subject to review - Leave to appeal). (1) Appeals shall lie to the Appellate Court or Supreme Court, in cases where any form of trial may be allowed by law, to review the final judgments, orders or decrees of the circuit Courts, the municipal Court of Cook County, the County Courts, the City Courts and other courts making judgments orders and decrees are reviewable thereon. * * *"

In the case of Brown v. Lincoln State Bank, 368 Ill. 36, the court in interpreting a final order in which an appeal may lie to this court, on page 42, said:

> "The test as to whether a judgment, decree or order is final and appealable is whether it terminates the litigation on the merits of the case and determines the rights of the parties. (People v. Illinois Central Gulf Railroad, 368 Ill. 401). In order for the trial court to only be concerned with the accounting."

It must in case be apparent that there is no element of finality in connection with these orders. The court directed the master to re-advertise and re-sell the property and whether or not

anyone is injured by the court's action can only be determined after the sale and confirmation thereof and the final decree entered.

For the reasons herein given and for want of jurisdiction in this court to review the questions raised on this appeal the same is hereby dismissed.

APPEAL DISMISSED.

HEBEL, P.J. AND HALL, J. CONCUR.

anyone is injured by the court's action can only be determined after the sale and confirmation thereof and the final decree entered.

For the reasons stated given and for want of jurisdiction in this court to review the questions raised on this appeal the same is hereby dismissed.

Chief Justice.

Messrs. J.J. Lee Esq., J. Moore.

39638

ROBERT P. GUST COMPANY, Inc.,
a Corporation,
Appellant,

vs.

KIP CORPORATION, a Corporation,
Appellee.

39A

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

295 I.A. 620

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in assumpsit against defendant to recover damages for a breach of contract. At the close of the evidence, on defendant's motion, there was a directed verdict in plaintiff's favor for $576.68, judgment was entered on the verdict and plaintiff appeals.

The record discloses that on January 11, 1929, the parties entered into a written agreement by which plaintiff was made the sales manager with the exclusive right of sale of defendant's products in more than 30 states. The contract was for a period of 3 years unless sooner terminated. Plaintiff was to be paid for its services 15% on the wholesale list price of defendant's goods that it sold, the commission to be paid weekly. The contract further provided that defendant was to pay plaintiff, upon the execution of the contract, $4250 "as organization expense to cover initial operations." And further, "The manufacturer [defendant] agrees to set an advertising appropriation based on not less than twenty-five per cent. (25%) of manufacturer's wholesale list price on stated product during the term of" the agreement unless by the mutual agreement of the parties such appropriation should be either increased or decreased; "the manufacturer [defendant] will arrange to pay for advertising sufficient in its sole judgment and discretion to carry on the initial advertising expenditures." Paragraphs 13 and 17 of the contract are as follows: "13. Anything herein to the contrary notwithstanding, if the minimum sales at list price

HOBART F. [illegible] CORP'N, INC.,
a corporation,
Appellant,

vs.

ILIP COMPLAINT, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF COOK COUNTY.

HON. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in assumpsit against defendant to recover damages for a breach of contract. At the close of the evidence, on defendant's motion, there was a directed verdict in plaintiff's favor for $372.00, judgment was entered on the verdict and plaintiff appeals.

The record discloses that on January 1, 1929, the parties entered into a written agreement by which plaintiff was made the sales manager with the exclusive right to sale of defendant's products in more than 20 states. The contract was for a period of 3 years unless sooner terminated. Plaintiff was to be paid for its services 15% of the wholesale list price of defendant's goods that it sold, the commission to be paid weekly. The contract further provided that defendant was to pay plaintiff, upon the execution of the contract, $4250 "as organization expense to cover initial operations." And further, "The manufacturer (defendant) agrees to set an advertising appropriation based on not less than twenty-five per cent. (25%) of manufacturer's wholesale list price on stated product during the term of" the agreement unless by the mutual agreement of the parties such appropriation should be either increased or decreased; "the manufacturer (defendant) will arrange to pay for advertising sufficient in its sole judgment and discretion to carry on the initial advertising expenditures." Paragraphs 13 and 17 of the contract are as follows: "13. Anything herein to the contrary notwithstanding, if the minimum sales at list price

by the sales manager shall not be $400,000 for the first year, or $500,000 for the second year, or $750,000 for the third year, this contract may be cancelled by the manufacturer [defendant] on written notice of thirty (30) days whenever the amount of sales falls below said quota." "17. Anything herein to the contrary notwithstanding the manufacturer shall have the right to cancel this contract at any time after one year from the date hereof upon thirty (30) days written notice to the sales manager [plaintiff]. In such event the actual expense of the sales manager over income from the inception of the contract to the date of cancellation plus the sum of Twenty-five Thousand Dollars ($25,000) in cash shall be paid to the sales manager."

Upon the execution of the contract plaintiff proceeded to sell defendant's products and at one time employed 28 men for the purpose who devoted more than 60% of their time to the work. Sales were made and commissions paid until about July, 1929, when some of the advertising contracts made by defendant were cancelled because the business was not increasing as both parties had hoped. December 10, 1929, defendant sent plaintiff a written notice stating that defendant "elects to terminate the agreement made the 11th day of January, 1929," specifying three reasons, the third of which was: "That you have failed to live up to the terms and conditions of Paragraph 13 of said agreement in that the minimum sales at list price made by you have not been and cannot possibly be $400,000 for the first year of said contract." It was stipulated that this notice was received by plaintiff December 14, 1929, by registered mail. January 18, 1930, defendant sent to plaintiff another notice that it had elected to terminate the contract for the same reasons mentioned in the notice of December 10th, the only difference in the two notices being the elimination of the words, "and cannot possibly be" in the third paragraph of the notice of December 10th, so that

by the sales manager shall not be $400,000 for the first year, or $500,000 for the second year, or $750,000 for the third year, this contract may be cancelled by the manufacturer (defendant) on written notice of thirty (30) days whenever the amount of sales falls below said quota." "17. Anything herein to the contrary notwithstanding the manufacturer shall have the right to cancel this contract at any time after one year from the date hereof upon thirty (30) days written notice to the sales manager (plaintiff). In such event the actual expense of the sales manager over income from the inception of the contract to the date of cancellation plus the sum of Twenty-Five Thousand Dollars ($25,000) in cash shall be paid to the sales manager."

Upon the execution of the contract plaintiff proceeded to sell defendant's products and at one time employed 25 men for the purpose who devoted more than 50% of their time to the work. Sales were made and commissions paid until about July, 1929, when some of the advertising contracts made by defendant were cancelled because the business was not increasing as both parties had hoped. December 10, 1929, defendant sent plaintiff a written notice stating that defendant "elects to terminate the agreement made the 11th day of January, 1929," specifying three reasons, the third of which was: "That you have failed to live up to the terms and conditions of Paragraph 15 of said agreement in that the minimum sales at list price made by you have not been and cannot possibly be $400,000 for the first year of said contract." It was stipulated that this notice was received by plaintiff December 14, 1929, by registered mail. January 18, 1930, defendant sent to plaintiff another notice that it had elected to terminate the contract for the same reasons mentioned in the notice of December 10th, the only difference in the two notices being the elimination of the words, "and cannot possibly be" in the third paragraph of the notice of December 10th, so that

paragraph 3 of the notice of January 18th read: "That you have failed to live up to the terms and conditions of Paragraph 13 of said agreement in that the minimum sales at list price made by you have not been the sum of $400,000.00 for the first year of said contract." It was further stipulated that the 2nd notice was received by defendant by registered mail January 21, 1930. The court, on plaintiff's motion, erroneously struck from the evidence the notice of December 10th. Whether that notice was sufficient to terminate the contract, it having been given before the expiration of the first year, it is not necessary to determine, but the notice was some evidence tending to show that defendant intended to cancel the contract, and the question is properly before us. What defendant did after receiving the two notices does not clearly appear except that some of plaintiff's representatives continued to try to make sales for a month or more after the receipt of the second notice.

The evidence shows the sales made by plaintiff for the first year amounted to $125,000; that defendant had paid out for advertising $175,000, and that the amount of the advertising, as proposed to be done by defendant after the execution of the contract would cost $435,000, and that most of this proposed advertising was cancelled by defendant about July, 1929.

Plaintiff claimed in its declaration that it was entitled to the $25,000 mentioned in paragraph 17 of the contract above quoted, and makes claims for other amounts, the ad damnum being $40,000. In this court plaintiff contends it is entitled to recover (1) the $25,000, with interest thereon under paragraph 17; (2) $650 "storage expense and interest thereon"; (3) and the $576.68, being the amount of the judgment rendered in its favor. This latter item was for commissions earned but not paid, and the defendant on the hearing admitted plaintiff was entitled to a judgment for this amount.

paragraph 3 of the notice of January last read: "Had you have failed to live up to the terms and conditions of paragraph 1) of said agreement in that the minimum sales at list price made by you have not been the sum of $300,000.00 for the first year of said contract." It was further stipulated that the 3rd notice was received by defendant by registered mail January 21, 1930. The court, on plaintiff's motion, erroneously struck from the evidence the notice of December 10th. Whether that notice was sufficient to terminate the contract, it having been given before the expiration of the first year, it is not necessary to determine, but the notice was some evidence tending to show that defendant intended to cancel the contract, and the question is properly before us. What defendant did after receiving the two notices does not clearly appear except that some of plaintiff's representatives continued to try to make sales for a month or more after the receipt of the second notice.

The evidence shows the sales made by plaintiff for the first year amounted to $[illegible],000; that defendant had paid out for advertising $[illegible],000, and that the amount of the advertising, as proposed to be done by defendant after the execution of the contract would cost $[illegible],000, and that most of this proposed advertising was cancelled by defendant about July, 1929.

Plaintiff claimed in its declaration that it was entitled to the $[illegible],000 mentioned in paragraph 17 of the contract above quoted, and makes claims for other amounts, the ad damnum being $40,000. In this court plaintiff contends it is entitled to recover (1) the $25,000, with interest thereon under paragraph 17; (2) $800 "storage expense and interest thereon"; (3) and the $576.64, being the amount of the judgment rendered in its favor. This latter item was for commissions earned but not paid, and the defendant on the hearing admitted plaintiff was entitled to a judgment for this amount.

The trial Judge held that the contract was terminated under the provisions of Paragraph 13, above quoted, and that Paragraph 17 did not apply. We agree with this holding. Paragraph 13 provides that unless the minimum sales made by plaintiff for the first year amounted to $400,000 defendant might cancel the contract upon 30 days notice. Defendant gave plaintiff two notices, stating specifically that it terminated the contract under Paragraph 13 because the sales had not amounted to $400,000, and this seems to be the fact, the sales having amounted to but $125,000. Paragraph 17 of the contract provides that it may be cancelled at any time after one year upon giving 30 days written notice to plaintiff. Under this paragraph no reason need be given. Defendant is given the absolute right to cancel the contract, and where the cancellation is made under that paragraph defendant must pay plaintiff $25,000 in cash. We think it obvious that paragraph is not applicable to the facts in the case before us; but plaintiff contends that it did not breach the contract in failing to sell $400,000 worth of goods the first year because its failure to do so was caused by the action of defendant in cancelling the advertising contracts in July, 1929, which advertisements would have created a market for the goods so that plaintiff could sell them. But on this record, even if we assume this to be the fact, there is no tangible evidence upon which any damages to plaintiff could be predicated.

As to the item of $650 counsel for plaintiff say: "It was proved that *** $650 which plaintiff paid for storage on defendant's goods has remained not refunded to plaintiff," and therefore that plaintiff is entitled to this amount. But the difficulty with this contention is that there is no evidence that plaintiff paid the $650 or became liable to pay that amount. The only evidence is that of plaintiff's bookkeeper who testified as to items shown in

The trial Judge held that the contract was terminated under the provisions of paragraph 18, above quoted, and that paragraph 17 did not apply. We agree with this holding. Paragraph 18 provides that unless the minimum sales made by plaintiff for the first year amounted to $400,000 defendant might cancel the contract upon 30 days notice. Defendant gave plaintiff two notices, stating specifically that it terminated the contract under paragraph 18 because the sales had not amounted to $400,000, and this seems to be the fact, the sales having amounted to not $125,000. Paragraph 17 of the contract provides that it may be cancelled at any time after one year upon giving 30 days written notice to plaintiff. Under this paragraph no reason need be given. Defendant is given the absolute right to cancel the contract, and where the cancellation is made under that paragraph defendant must pay plaintiff $25,000 in cash. We think it obvious that paragraph 18 is not applicable to the facts in the case before us; but plaintiff contends that it did not breach the contract in failing to sell $400,000 worth of goods the first year because its failure to do so was caused by the action of defendant in cancelling the advertising contracts in July, 1920, which advertisements would have created a market for the goods so that plaintiff could sell them. But on this record, even if we assume this to be the fact, there is no tangible evidence upon which any damages to plaintiff could be predicated.

As to the item of $650 counsel for plaintiff say: "It was proved that the $650 which plaintiff paid for storage on defendant's goods has remained not refunded to plaintiff," and therefore that plaintiff is entitled to this amount. But the difficulty with this contention is that there is no evidence that plaintiff paid the $650 or became liable to pay that amount. The only evidence is that of plaintiff's bookkeeper who testified as to items shown in

her books, which items showed a balance of $1093.60 as of November 30, 1930. On cross-examination she testified this total "includes commissions and storage. There were 13 months storage at $50 a month." But there is no evidence that this item was paid by plaintiff or that it became liable therefor.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

her books, which items showed a balance of $[illegible].00 as of November 30, 1932. On cross-examination she testified this total "includes commissions and storage. There were 13 months storage at $30 a month." But there is no evidence that this item was paid by plaintiff or that it became liable therefor.

The judgment of the superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Moorely and Matchett, JJ., concur.

39654

ESTHER FISCHER,
Appellee,

vs.

LEONARD E. KLUCK,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

40A

295 I.A. 621

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her through defendant's negligent driving of an automobile. There was a verdict and judgment in plaintiff's favor for $2100 and defendant appeals.

The record discloses that about six o'clock on the evening of November 11, 1935, plaintiff, a married woman, was walking south across 79th street on the west crosswalk of the intersection of Aberdeen street; that when she reached a point near the north rail of the westbound street car track in 79th street she was struck by defendant's automobile which was being driven west at a speed variously estimated at from 15 to 20 miles an hour. Plaintiff was intending to board an eastbound street car in 79th street at its intersection with Aberdeen street; she had been visiting friends at 7752 Aberdeen street; it was raining and she had her umbrella up; she walked south on the west sidewalk of Aberdeen street and when she reached the north curb of 79th street an eastbound street car was approaching from the west coming to a stop; plaintiff looked toward the east and said she saw an automobile about 150 feet from her coming west near or in the westbound street car track; she proceeded south and when she reached the north rail of the westbound track she hesitated 3 or 4 seconds, looked at the motorman of the street car, who looked at her at the same time, and at that time she was struck by defendant's westbound automobile. The evidence

ESTHER ISOMAN,
Appellee,

vs.

EDWARD J. KLUCK,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her through defendant's negligent driving of an automobile. There was a verdict and judgment in plaintiff's favor for $1500 and defendant appeals.

The record discloses that about six o'clock on the evening of November 11, 1928, plaintiff, a married woman, was walking south across 79th street on the west crosswalk of the intersection of Aberdeen street; that when she reached a point near the north rail of the westbound street car track in 79th street she was struck by defendant's automobile which was being driven west at a speed variously estimated at from 15 to 20 miles an hour. Plaintiff was intending to board an eastbound street car in 79th street at its intersection with Aberdeen street; she had been visiting friends at 7752 Aberdeen street; it was raining and she had her umbrella up; she walked south on the west sidewalk of Aberdeen street and when she reached the north curb of 79th street an eastbound street car was approaching from the west coming to a stop; plaintiff looked toward the east and said she saw an automobile about 150 feet from her coming west near or in the westbound street car track; she proceeded south and when she reached the north rail of the westbound track she hesitated 3 or 4 seconds, looked at the motorman of the street car, who looked at her at the same time, and at that time she was struck by defendant's westbound automobile. The evidence

indicates that the automobile passed to the south of plaintiff and that she was struck by the north side of it. It was dark at the time but the evidence indicates that the intersection was fairly well lighted and that the lights of defendant's automobile were on.

Defendant testified that at the time in question he was driving his Ford car, taking home his wife and another lady who was in business with her; that as he approached Aberdeen street he was traveling about 15 miles an hour; that his car was straddling the south rail of the westbound track; that it was raining and just past dusk; that a street car was about 70 or 80 feet ahead of him which he had followed for about 2½ blocks; that he did not see plaintiff but heard a thud like something striking the north side of his car; that he stopped in a short distance and went back; that the motorman and other persons took plaintiff into a nearby building.

Miss Sheehan, who was sitting in the front seat of his automobile, and his wife who was in the back seat, both testified, each saying she did not see plaintiff, but that they heard something strike the side of the automobile.

Defendant contends that the court erred in denying his motion for a directed verdict at the close of plaintiff's evidence and again when he renewed the motion at the close of all the evidence because, "plaintiff failed to establish the exercise of due care on her part and failed to establish the negligence of defendant as charged in the complaint." Whether the court erred in overruling defendant's motion made at the close of plaintiff's case is not involved. Defendant put in testimony after the motion was overruled, and when all the evidence was in he did not renew the motion because, as he says, that motion could not then be renewed, but made a new motion, which is the proper procedure for a directed verdict. We think it obvious that the evidence was sufficient to find that defendant was guilty of negligence because it shows he

indicated that the automobile passed to the south of plaintiff and that she was struck by the north side of it. It was dark at the time but the evidence indicated that the intersection was fairly well lighted and that the lights of defendant's automobile were on.

Defendant testified that at the time in question he was driving his ford car, taking home his wife and another lady who was in business with her; that as he approached Aberdeen street he was traveling about 15 miles an hour; that his car was straddling the south rail of the westbound track; that it was raining and just past dusk; that a street car was about 70 or 80 feet ahead of him which he had followed for about 24 blocks; that he did not see plaintiff but heard a thud like something striking the north side of his car; that he stopped in a short distance and went back; that the motorman and other persons took plaintiff into a nearby building.

Miss Greenan, who was sitting in the front seat of his automobile, and his wife who was in the back seat, both testified, each saying she did not see plaintiff, but that they heard something strike the side of the automobile.

Defendant contends that the court erred in denying his motion for a directed verdict at the close of plaintiff's evidence and again when he renewed the motion at the close of all the evidence begun, "plaintiff failed to establish the existence of due care on her part and failed to establish the negligence of defendant as charged in the complaint." Whether the court erred in overruling defendant's motion made at the close of plaintiff's case is not involved. Defendant put in testimony after the motion was overruled, and when all the evidence was in he did not renew the motion. Counsel, as he says, that motion could not then be renewed, but made a new motion, which is the proper procedure for a directed verdict. We think it obvious that the evidence was sufficient to find that defendant was guilty of negligence because it shows he

did notsee plaintiff, nor did either of the ladies in the car with him see her until after the accident. Certain it is that we would not be warranted in saying that the verdict of the jury, finding he was guilty of negligence, is against the manifest weight of the evidence.

The question then remains, Was plaintiff guilty of contributory negligence as a matter of law? The test in such case is, Would all reasonable minds reach the conclusion that the conduct of plaintiff at the time was violative of all rational standards of conduct applicable to persons in similar circumstances? Kelly v. The Chicago City Ry. Co., 283 Ill. 640; Bale v. Chicago Junction Ry. Co., 259 Ill. 476; Louthan v. Chicago City Ry. Co., 198 Ill. App. 329; Rethaler v. Crane Co., 218 Ill. App. 267; Moyer v. Vaughan's Seed Store, 242 Ill. App. 308.

In Heidenreich v. Bremner, 260 Ill. 439, which was a suit brought to recover damages for personal injuries alleged to have been sustained as a result of being knocked down and run over by a team and wagon, it was held that the failure of plaintiff to look for approaching vehicles before starting across the street at a public crossing, was not necessarily negligent under all circumstances. The court there said (p. 451): "It has long been the settled rule in this jurisdiction that 'it cannot be said, as a matter of law, that a person is in fault in failing to look and listen if misled without his fault or where the surroundings may excuse such failure.' (Citing authorities.) We see no reason why this long established rule of law should be changed."

In Bruhl v. Anderson, 189 Ill. App. 461, damages were claimed for personal injuries alleged to have resulted from defendant's negligence in driving an automobile at a high rate of speed in a residential district of Chicago. Plaintiff had a judgment of

did notice plaintiff, nor did either of the ladies in the car with him see her until after the accident. Granting it is true we would not be warranted in saying that the verdict of the jury, finding he was guilty of negligence, is against the manifest weight of the evidence.

The question then remains, was plaintiff guilty of contributory negligence as a matter of law? The test in such case is, Would all reasonable minds reach the conclusion that the conduct of plaintiff at the time was violative of the reasonable standards of conduct applicable to persons in similar circumstances? Reilly v. The Chicago City Ry. Co., 230 Ill. 640; Kelly v. Chicago Junction Ry. Co., 251 Ill. 476; Lowman v. Chicago City Ry. Co., 198 Ill. App. 327; Metzler v. Crane Co., 216 Ill. App. 327; Boyer v. Vaughan's Read Store, 241 Ill. App. 300.

In Heidenreich v. Kreuz, 201 Ill. 127, which was a suit brought to recover damages for personal injuries alleged to have been sustained as a result of being knocked down and run over by a team and wagon, it was held that the failure of plaintiff to look for approaching vehicles before starting across the street at a public crossing, was not necessarily negligent under all circumstances. The court there said (p. 131): "It has long been the settled rule in this jurisdiction that 'it cannot be said, as a matter of law, that a person is in fault in failing to look and listen if misled without his fault or where the surroundings may excuse such failure.' (Citing authorities.) We see no reason why this long established rule of law should be changed."

In Brunt v. Anderson, 190 Ill. App. 421, damages were claimed for personal injuries alleged to have resulted from defendant's negligence in driving an automobile at a high rate of speed in a residential district of Chicago. Plaintiff had a judgment of

$7500. The accident happened about 8 o'clock in the evening; it was dark and raining hard, and there was a high wind. Plaintiff was walking north across Washington boulevard at the west side of 41st avenue, a north and south street. When plaintiff reached the curbstone on the south side, "he hesitated a moment, raised his umbrella, looked in both directions, 'saw nothing' and then started across at a 'trot' or fast walk, holding his umbrella down overhis head and shoulders; at that moment defendant's automobile, with two headlights" came east on Washington boulevard at 25 to 35 miles an hour; other witnesses said from 13 to 15 miles an hour. Plaintiff was struck and injured. The judgment was affirmed. It was contended that plaintiff was guilty of contributory negligence. The court held the question was one of fact for the jury, saying, "The question was one of fact for the jury, and after due examination and consideration of the evidence, we think the verdict of the jury upon that question is not manifestly against the weight of the evidence. In no event can appellee's failure to see the automobile or even his failure to look at all, if such were the fact, be held to be contributory negligence as a matter of law, under the circumstances shown in this case." The court then quotes from the Bremner case, 260 Ill.439, from which we have above quoted.

In Gannon v. Kiel, 252 Ill. App. 550, plaintiff, a young lady, was crossing a street in East St. Louis from west to east on the north crosswalk of a street intersection at about 8 o'clock in the morning. It was raining and she had an umbrella over her head; when she was a little more than half way across the street she was struck by defendant's northbound automobile, coming in contact with the left side of it. Defendant did not see her before the impact. A judgment in her favor was affirmed. The court held that there was sufficient evidence to show that defendant was guilty of wilful and wanton misconduct, and said (p. 557): "It is the clear duty of an

$7500. The accident happened about 8 o'clock in the evening; it was dark and raining hard, and there was a high wind. Plaintiff was walking north across Washington Boulevard at the west side of Hat avenue, a north and south street. When plaintiff reached the curb-stone on the south side, "he hesitated a moment, raised his umbrella, looked in both directions, 'saw nothing' and then started across at a 'trot' or fast walk, holding his umbrella down overhis head and shoulders; at that moment defendant's automobile, with two head-lights" came east on Washington Boulevard at 25 to 30 miles an hour; other witnesses said from 15 to 18 miles an hour. Plaintiff was struck and injured. The judgment was affirmed. It was contended that plaintiff was guilty of contributory negligence. The court held the question was one of fact for the jury, saying, "The question was one of fact for the jury, and after due examination and consideration of the evidence, we think the verdict of the jury upon that question is not sufficiently against the weight of the evidence. In no event can appellee's failure to see the automobile or even his failure to look at all, if such were the fact, be held to be contributory negligence as a matter of law, under the circumstances shown in this case." The court then quotes from the Brewster case, 280 Ill.429, from which we have above quoted.

In Gannon v. Kiel, 98 Ill. App. 87, plaintiff, a young lady, was crossing a street in East St. Louis from west to east on the north crosswalk of a street intersection at about 8 o'clock in the morning. It was raining and she had an umbrella over her head; when she was a little more than half way across the street she was struck by defendant's northbound street car, coming in contact with the left side of it. Defendant did not see her before the impact. A judgment in her favor was affirmed. The court held that there was sufficient evidence to show that defendant was guilty of wilful and wanton misconduct, and said (p. 89): "It is the clear duty of an

automobile driver to have regard for the safety regulations provided by law, and to take into consideration existing conditions at the place where an injury may occur. The defendant did not look, when it was his duty to be on his guard and have his car under control, at a busy street intersection where he was bound to know that pedestrians might be crossing." The court further said that if it was necessary to determine the question whether plaintiff was guilty of contributory negligence, he would hold plaintiff was not guilty as a matter of law, but that the question was for the jury. In the instant case we are of opinion that whether plaintiff was guilty of contributory negligence was a question for the jury, and we are unable to say that its finding in favor of plaintiff is against the manifest weight of the evidence. See also Gills v. N. Y. C. & St. L. R. R. Co., 342 Ill. 455; Goldblatt v. Brocklebank, 166 Ill. App. 315; C. & N.W. Ry. Co. v. Hansen, 166 Ill. 623; Coleman v. Wienhoeber, 291 Ill. App. 603 (9 N.E. (2d) 265.)

Complaint is also made that the court erred in permitting counsel for plaintiff to interrogate jurors on their voir dire examination as to whether they had any financial interest in the Union Automobile Indemnity Association. Before the trial began counsel for plaintiff submitted an affidavit by plaintiff that she was informed and believed the suit was being defended by the Union Automobile Indemnity Association, and asked permission of the court to examine the prospective jurors as to whether they had any financial interest in that company. Objection was made and overruled and a question was put to some of the prospective jurors. The procedure followed and the question asked (except for the name of the insurance company) were the same as in Smithers v. Henriquez, 287 Ill. App. 95. Since the filing of the briefs the judgment of the Appellate court in the Smithers case has been affirmed by the Supreme court. The procedure there followed and held not to be reversibly erroneous, is the same

automobile driver to have regard for the safety regulations provided by law, and to take into consideration existing conditions at the place where an injury may occur. The defendant did not look, when it was his duty to be on his guard and have his car under control, at a busy street intersection where he was bound to know that pedestrians might be crossing." The court further said that if it was necessary to determine the question whether plaintiff was guilty of contributory negligence, he would hold plaintiff was not guilty as a matter of law, but that the question was for the jury. In the instant case we are of opinion that whether plaintiff was guilty of contributory negligence was a question for the jury, and we are safe in so say that the finding in favor of plaintiff is against the greatest weight of the evidence. See also Hills v. N. Y. C. & St. L. R. R. Co., 242 Ill. 455; Goldblatt v. Rosenbaum, 186 Ill. App. 315; C. & A. W. Ry. Co. v. Hanson, 188 Ill. 623; Gleason v. Hightower, 201 Ill. App. 603 (9 N.E. (2d) 265.)

Complaint is also made that the court erred in permitting counsel for plaintiff to interrogate jurors on their voir dire examination as to whether they had any financial interest in the Union Automobile Indemnity Association. Before the trial began counsel for plaintiff submitted an affidavit by plaintiff that he was informed and believed the suit was being defended by the Union Automobile Indemnity Association, and asked permission of the court to examine the prospective jurors as to whether they had any financial interest in that company. Objection was made and overruled and a question was put to some of the prospective jurors. The procedure followed and the question asked (except for the name of the insurance company) were the same as in Smithers v. Hawkinson, 287 Ill. App. 91. Since the filing of the briefs the judgment of the appellate court in the Smithers case has been affirmed by the supreme court. The procedure there followed and held not to be reversibly errone us, is the same

as is involved in the question now before us. In these circumstances it follows that defendant's contention cannot be sustained.

On the trial the motorman of the eastbound street car in 79th street testified as to what he did at the time plaintiff was injured, and that he had made a written report to his company shortly after the accident, which he produced. By agreement of counsel it was admitted in evidence, and the record discloses that both counsel thought the jury might want to see it. It was afterward taken by the jurors when they went to consider of their verdict. Counsel for defendant contends this was error. We think he is not in a position to urge this here and, moreover, there is nothing in the statement about which there is any dispute. Nor is there anything in the statement from which it could be inferred that defendant was to blame for the accident.

A further contention is that the court erred in admitting incompetent evidence over defendant's objection. The evidence was that plaintiff's husband paid a bill of $249 to the hospital where plaintiff was taken after the injury, and the check and the receipt of the hospital are in evidence. And further, plaintiff testified that after the accident she paid $15.45 for a new pair of lenses - that her glasses were not broken, but "I could not wear them after the accident. I had to have other glasses." Plaintiff's husband testified that he gave a check to the hospital for the amount of its bill. Counsel for defendant objected - "My objection goes to this man's testimony with reference to payment by him of the bill." He then testified that the money was in the joint account of himself and his wife; that it was as much his wife's money as it was his. We think the objection of counsel for defendant did not specifically point out why the hospital bill and the check were not admissible. Moreover, we think the evidence was properly admitted because it appears without dispute that the money was the joint money of

as is involved in the question for before us. In these circumstances it follows that defendant's contention cannot be sustained.

In the trial the motorman of the eastbound street car in 72th street testified as to what he did at the time plaintiff was injured, and that he had made a written report to his company shortly after the accident, which he produced. By agreement of counsel it was admitted in evidence, and the record discloses that both counsel thought the jury might want to see it. It was afterward taken by the jurors when they went to consider of their verdict. Counsel for defendant contends this was error. We think it is not in a position to urge this here and, moreover, there is nothing in the statement about which there is any dispute. For is there anything in the statement from which it could be inferred that defendant was to blame for the accident.

A further contention is that the court erred in admitting incompetent evidence over defendant's objection. The evidence was that plaintiff's husband paid a bill of $149 to the hospital where plaintiff was taken after the injury, and the check and the receipt of the hospital are in evidence. And further, plaintiff testified that after the accident she paid $18.45 for a new pair of lenses - that her glasses were not broken, but "I could not wear them after the accident. I had to have other glasses." Plaintiff's husband testified that he gave a check to the hospital for the amount of its bill. Counsel for defendant objected - "My objection goes to this man's testimony with reference to payment by him of the bill." He then testified that the money was in the joint account of himself and his wife; that it was as much his wife's money as it was his. We think the objection of counsel for defendant did not specifically point out why the hospital bill and the check were not admissible. Moreover, we think the evidence was properly admitted because it appears without dispute that the money was the joint money of

plaintiff and her husband. And we think plaintiff's testimony that she had to have other lenses after the accident, for which she paid $15.45, rendered her testimony in this respect sufficient.

On the trial of the case defendant sought to read to the jury all or certain portions of a deposition "as an adverse examination" which he had taken of plaintiff several months before the trial of the cause. Upon objection of plaintiff's counsel, the offer was excluded, the trial court stating that if there was any part of the deposition that tended to impeach what plaintiff said on the trial, he would permit that portion to be read. We have examined the deposition in the record as well as the testimony given by plaintiff and she testified to substantially the same facts on both occasions; nor was there any admission which might be construed as being against her interest in the deposition. There was no error in the ruling. Defendant's counsel cross-examined plaintiff both in the taking of the deposition and on the trial, concerning a statement she gave to one of his investigators shortly after the accident, some of which was at variance to the testimony in the deposition and on the trial. But defendant had the benefit of all this. Furthermore, he did not call anyone to testify as to what plaintiff said at the time the statement was taken.

Complaint is also made that the court erred in instructing the jury, "that the law in this State provides that where traffic control signals are not in place or in operation, the driver of a vehicle shall yield the right of way, slowing down or stopping, if need be, to so yield, to a pedestrian crossing the roadway within any marked crosswalk, or within any unmarked crosswalk at an intersection." The argument is that in Coleman v. Wienhoeber, 291 Ill. App. 603, where a similar question arose, we held that the statute embodied in the instruction was not applicable to the facts in that

plaintiff and her husband. And we think plaintiff's testimony that she had to have other lessons after the accident, for which she paid $15.45, rendered her testimony in this respect sufficient.

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case because, as counsel said, "it appeared that plaintiff had hesitated," as was the fact in the instant case. We think this argument cannot be sustained. In the Coleman case, plaintiff, who was crossing the street, stopped to allow the approaching automobile to pass; that is not the situation in the case before us. Plaintiff hesitated, not to allow the automobile to pass in front of her, but to see if she had time to pass in front of the street car before it proceeded east.

Defendant also complains of an instruction given at plaintiff's request, on the question of damages. The instruction is not set out in full in defendant's brief, as it should be. Zorger v. Hillman's, 287 Ill. App. 357. The objection to the instruction is hypercritical. It could only affect the amount of the verdict and no complaint is made that it is excessive.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

case because, as noted supra, "it appeared that plaintiff had instituted," as was the fact in the instant case, "an action to attachment against defendant." In the Coleman case, plaintiff, who was crossing the street, stopped to allow the approaching automobile to pass; that is not the situation in the case before us. Plaintiff instituted, not to allow the automobile to pass in front of her, but to see if she had time to pass in front of the street car before it proceeded east.

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The judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McGurdy and Burchett, JJ., concur.

39919

MURIEL DUPUIS,
Appellee,

vs.

GOLDBLATT BROS., INC., a Corporation, and LUSTIG BROS. BEAUTY PARLORS, INC., a Corporation,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

295 I.A. 621

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained by her on account of the negligence of defendants in placing a pail of water in an aisle in defendants' place of business, against which plaintiff stumbled and was injured. There was a jury trial and a verdict and judgment in plaintiff's favor for $2000 and defendants appeal.

The record discloses that Goldblatt Bros., Inc., conducts a department store at Lincoln and Belmont avenues in Chicago, and defendant Lustig Bros. Beauty Parlors, Inc., conducts a beauty parlor, in which both defendants have an interest, in a part of the premises; that on April 6 or 7, 1936, plaintiff went to the beauty parlor to have some work done; the work took about 2½ hours and as plaintiff was passing from one room intending to go to another to get her wraps preparatory to leaving the store, she stumbled against a pail of water which was placed in a narrow aisle or passageway, and claims she was severely injured. Shortly before plaintiff's work was completed two pails containing water were placed in an aisle for the purpose of mopping the floor when the place closed, and there is also some evidende to the effect that chairs were placed to block off this aisle so that it could not be used except by the porter who was to scrub the floor. The place was well lighted at the time but plaintiff did not see the

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The record discloses that Goldblatt Bros., Inc., conducts a department store at Lincoln and Belmont avenues in Chicago, and defendant Beauty Bros. Beauty Parlors, Inc., conducts a beauty parlor, in which both defendants have an interest, in a part of the premises; that on April 6 or 7, 1936, plaintiff went to the beauty parlor to have some work done; the work took about 2½ hours and as plaintiff was passing from one room intending to go to another to get her wraps preparatory to leaving the store, she stumbled against a pail of water which was placed in a narrow aisle or passageway, and claims she was severely injured. Shortly before plaintiff's work was completed two pails containing water were placed in an aisle for the purpose of mopping the floor when the place closed, and there is also some evidence to the effect that chairs were placed to block off this aisle so that it could not be used except by the porter who was to scrub the floor. The place was well lighted at the time but plaintiff did not see the

pail until just as she struck it with her foot. As she struck the pail the water splashed on her clothing and stockings; some of defendant Lustig Bros.' employees took her into a small booth or room and dried her clothing; after this plaintiff left the store and was driven by her sister in an automobile to Dr. Lee's office at 1045 Lawrence avenue, about a mile from the store, where she was treated.

As to how the accident happened plaintiff testified: "When I stepped out of the drying room there was something - I just took one step and I fell over something. I fell forward on my hands and knees and I hit my head. Immediately after I fell everything was black in front of me and I had a sick headache;" that she was taken into one of the rooms and given a glass of water; her stockings were taken off; she was "soaking wet". While she was sitting in one of the rooms the door swung open and she saw a colored man pick up two pails in the doorway - "in the corridor."

Dr. Lee testified that he was acquainted with plaintiff and the other members of her family and had professionally attended other members of the family; that plaintiff came to his office about 6 o'clock on April 6, 1936, and seemed nervous and nauseated; that she vomited a couple of times in the office; that both her legs and ankles were bruised and the skin broken to the extent of 2 or 3 inches; that plaintiff complained of exhaustion, headache and severe pain in her legs, the right one possibly more so than the left; that he examined, dressed and bandaged her legs; that he thought one of plaintiff's sisters was with her at the time; that afterward he saw her practically every day at her home for about three weeks; that after that time she came to his office about three times a week for several months; "As a matter of fact I am still seeing her." (The trial began May 24, 1937, - more than 14 months after the accident;) that he used "medication on the legs and alternated more or less

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As to how the accident happened plaintiff testified: "When I stepped out of the dressing room there was something - I just took one step and I fell over something. I fell forward on my hands and knees and I hit my head. Immediately after I fell everything was black in front of me and I had a sick headache;" that she was taken into one of the rooms and given a glass of water; her stockings were taken off; she was "soaking wet". While she was sitting in one of the rooms the door swung open and she saw a colored man pick up two pails in the doorway - "in the corridor."

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with boric acid applications;" that for her head he gave certain medication; that during the time he treated her she complained of exhausting headaches a great deal; that his diagnosis was "traumatic phlebitis," which means an inflammation of the veins; that the "bruises" and "lacerations" he found "inflamed and infected the veins in her legs;" that he diagnosed the condition of her head as "concussion of the brain;" that she complained of vertigo the first time he saw her; that the last time he saw plaintiff was about 2 weeks before, and that he looked at her right leg today at the request of plaintiff's attorney and found an area of "about two and a half or three inches, possibly four or five inches long that is still very much indurated - hardened;" that he believed her condition "would be more or less permanent."

Tessie Bleiweiss, called by defendants, testified that she was cashier for defendant Lustig Bros., and had been employed by that company for about five years; that she saw the accident, saw plaintiff come out of the drying room, turn the corner, take two or three steps, and she "kicked the pail that was standing there. Water splashed up and splashed on her;" that at that time the manager of the beauty shop, Mrs. Slovick, went to plaintiff. The witness further testified that plaintiff did not fall and did not tip over the pail; that there were some chairs in an aisle "which Mrs. Slovick moved when she went over to Mrs. Dupuis." Other witnesses also testified that plaintiff was not injured; that only her clothing and stockings were wet.

Defendants contend that the "verdict is against the manifest weight of the evidence," - the jury disregarded the evidence; that the medical testimony offered by plaintiff was "contingent, speculative and remote"; that the verdict was so excessive as to show passion and prejudice.

Whether defendants' contention is that the evidence, or the

with boric acid applications;" that for her head or eyes warm application; that during the tiredness per was consulted of exhaustion; that she had a great deal; that she lacked "nervous physicality," which means an inflammation of the veins; that the "bruises" and "lacerations" he found "inflamed and infected the veins in her legs;" that he diagnosed the condition of her head as "congestion of the brain;" that she complained of writing the first time he saw her; that she also by her physicality was about 8 weeks pregnant, and that he looked to her physicality as the presence of physicality's activity and found an hour of "quiet rest and a half or three months, possibly four or five months long; but is still very much indicated - however;" that he believed her certification "would be more or less permanent."

Lewis Flaherty, called by witness, testified that the was crawler for Atlantic Lobster Corp., and was employed by that company for about five years; that she was the captain, saw plaintiff come out of the drying room, stand two or three steps, and the "slipped the pail over the crawling there. Later slipped to and slipped on her;" that at that time the manager of the beach area, was. Davies, went to plaintiff. The witness further testified that plaintiff did not fall; she was up over the fall; that there were some shelves to a table "which was. Davies moved and she went up a to the. Jumping." Other witnesses was testified that plaintiff was not injured; that only her clothing and shoulder were wet.

Defendants contend that the "verdict is against the manifest weight of the evidence," - the jury disregarded the evidence; that medical testimony offered by plaintiff was "speculative, argumentative and remote"; that the verdict was so excessive as to show passion and prejudice.

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with boric acid applications;" that for her head he gave certain medication; that during the time he treated her she complained of exhausting headaches a great deal; that his diagnosis was "traumatic phlebitis," which means an inflammation of the veins; that the "bruises" and "lacerations" he found "inflamed and infected the veins in her legs;" that he diagnosed the condition of her head as "concussion of the brain;" that she complained of vertigo the first time he saw her; that the last time he saw plaintiff was about 2 weeks before, and that he looked at her right leg today at the request of plaintiff's attorney and found an area of "about two and a half or three inches, possibly four or five inches long that is still very much indurated - hardened;" that he believed her condition "would be more or less permanent."

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Defendants contend that the "verdict is against the manifest weight of the evidence," - the jury disregarded the evidence; that the medical testimony offered by plaintiff was "contingent, speculative and remote"; that the verdict was so excessive as to show passion and prejudice.

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with boric acid applications;" that for her head he gave certain medication; that during the time he treated her she complained of excruciating headaches a great deal; that his diagnosis was "traumatic phlebitis," which means an inflammation of the veins; that the "bruises" and "lacerations" he found "inflamed and inserted the veins in her legs;" that he diagnosed the condition of her head as "concussion of the brain;" that she complained of vertigo the first time he saw her; that the last time he saw plaintiff was about 2 weeks before, and that he looked at her right leg today at the request of plaintiff's attorney and found an area of "about two and a half or three inches, possibly four or five inches long that is still very much inflamed - [illegible]d;" that he believed her condition "would be more or less permanent."

[illegible] Maggie Blaiwess, called by defendants, testified that she was cashier for defendant Lustig Bros., and had been employed by that company for about five years; that she saw the accident, saw plaintiff come out of the drying room, turn the corner, take two or three steps, and she "kicked the pail that was standing there. Water splashed up and splashed on her;" that at that time the manager of the beauty shop, Mrs. Slovick, went to plaintiff. The witness further testified that plaintiff did not fall and did not trip over the pail; that there were some chairs in an aisle "which Mrs. Slovick moved when she went over to Mrs. Dugaia." Other witnesses also testified that plaintiff was not injured; that only her clothing and stockings were wet.

Defendants contend that the "verdict is against the manifest weight of the evidence," - the jury disregarded the evidence; that the medical testimony offered by plaintiff was "contingent, speculative and remote"; that the verdict was so excessive as to show passion and prejudice.

Further defendants' contention is that the evidence, or the

manifest weight of it, shows that plaintiff was not in the exercise of due care, or whether they also mean to say that defendants were guilty of no negligence, it is difficult to determine. But we think the question was for the jury. No complaint is made that the jury was not properly instructed. The jury adopted plaintiff's version of the case, and upon a consideration of all the evidence in the record we are unable to say that its finding is against the manifest weight of the evidence. In this state of the record it is obvious we would not be warranted, under the law, in disturbing the verdict and judgment. Nor can we say that the judgment is so excessive as to warrant interference on our part. The testimony of the Doctor, from which we have quoted, is to the effect that plaintiff was rather severely injured and was still suffering, as a result of the accident, at the time of the trial which was about 14 months after plaintiff was injured. And the Doctor also testified that her condition was more or less permanent. In these circumstances, we think it obvious we cannot say that the judgment is so excessive as to warrant us in disturbing it.

Complaint is also made that counsel for plaintiff indulged in improper, inflammatory and prejudicial argument to the jury.

During the trial defendants called the witness Sewell, an investigator, who testified that about two months prior to the trial he went to a certain address on the South side and endeavored to locate Jack Washington, who defendants thought was the porter who placed the pails of water in the aisle on the day of the accident, intending to produce him as a witness. Sewell testified that he was advised by a Dr. Snell, who was in charge of the premises on the South side, that Washington had left about six months before and had left no forwarding address. Afterward defendants called another witness who testified that Washington was not acting as porter on the day of the accident because he was ill at that time; that a new

manifest weight of it, shows that plaintiff was not in the exercise of due care, or whether they also mean to say that defendants were guilty of no negligence, it is difficult to determine. But we think the question was for the jury. No complaint is made that the jury was not properly instructed. The jury adopted plaintiff's version of the case, and upon a consideration of all the evidence in the record we are unable to say that its finding is against the manifest weight of the evidence. In this state of the record it is obvious we would not be warranted, under the law, in disturbing the verdict and judgment. Nor can we say that the judgment is so excessive as to warrant interference on our part. The testimony of the Doctor, from which we have quoted, is to the effect that plaintiff was rather severely injured and was still suffering, as a result of the accident, at the time of the trial which was about 14 months after plaintiff was injured. And the Doctor also testified that her condition was more or less permanent. In these circumstances, we think it obvious we cannot say that the judgment is so excessive as to warrant us in disturbing it.

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porter was working that day.

In rebuttal plaintiff called Dr. Snell, who testified that the witness Sewell had not called on him about two months before the trial, but while the trial was in progress.

Counsel for plaintiff in his closing argument said: "I will try and hurry to answer counsel, *** He says I called everybody on his side a liar. I haven't called anybody but Sewell, and I have proved he is a liar. The only thing he made a mistake about is the time he went out to the doctor. A man knows the difference between two months ago and the day before. *** That condemns Sewell as a liar, and you know it. Anything to help out Goldblatt's-perhaps he would go the limit." This is the part of the argument complained of, but no objection was then made by counsel for defendants. It is clear that the point cannot now be urged. Counsel for plaintiff, continuing his closing argument, said: "Then he tries to call Mrs. Dupuis' sister a liar. Well, he says, she told the truth about one thing and that is all and she lied about this and also about that." Counsel continued in this vein and discussed the evidence, and then said, "You have either got to believe gentlemen, that my client, Dr. Lee and myself are guilty of perjury, and me of subornation of perjury, or you have got to bring in a verdict for my client. There is no other issue in this case." Mr. Howard (counsel for defendants): "I object to the statement and to injecting this in the case." Mr. MacKinlay: "I have the responsibility for the testimony on the witness stand." Mr. Howard: "I object to counsel injecting this in the case." Mr. MacKinlay: "They may think I am--" Mr. Howard: "That is absolutely wrong." The Court: "Let it stand."

We think a great deal of this argument appears to be wholly unwarranted, although we have not the argument made to the jury by counsel for defendants, to which the argument in question appears to

porter was working that day.

In rebuttal plaintiff called Dr. Smith, who testified that the witness Sewell had not called on him about two months before the trial, but while the trial was in progress.

Counsel for plaintiff in his closing argument said: "I will try and hurry to answer counsel, *** He says I called everybody on his side a liar. I haven't called anybody but Sewell, and I have proved he is a liar. The only thing he made a mistake about is the time he went out to the doctor. A man knows the difference between two months ago and the day before. *** That concerns Sewell as a liar, and you know it. Anything to help out coldblattl'a-perspe he would go the limit." This is the part of the argument complained of, but no objection was then made by counsel for defendants. It is clear that the point cannot now be urged. Counsel for plaintiff, continuing his closing argument, said: "Then he tries to call Mrs. Dugais' sister a liar. Well, he says, she told the truth about one thing and that is all and she lied about this and also about that." Counsel continued in this vein and discussed the evidence, and then said, "You have either got to believe gentlemen, that my client, Mr. Lee and myself are guilty of perjury, and me of subornation of perjury, or you have got to bring in a verdict for my client. There is no other issue in this case." Mr. Howard (counsel for defendants): "I object to the statement and to injecting this in the case." Mr. Hackinlay: "I have the responsibility for the testimony on the witness stand." Mr. Howard: "I object to counsel injecting this in the case." Mr. Hackinlay: "They may think I am--" Mr. Howard: "That is absolutely wrong." The Court: "Let it stand."

We think a great deal of this argument appears to be wholly unwarranted, although we have not the argument made to the jury by counsel for defendants, to which the argument in question appears to

have been in reply. In these circumstances we think the record is not in condition to enable us to pass on the question intelligently. In any event, considering all the evidence in the record, we think we would not be warranted in disturbing the verdict or judgment. There is no doubt that plaintiff was injured as the result of defendants placing the pails of water in the narrow aisle. The attempt to locate the porter Jack Washington, defendants' employee, who it was thought placed on the floor the pails of water over which plaintiff stumbled, is of little importance since it developed that he was not the porter employed on the day of the accident.

There is considerable evidence and argument in the briefs as to whether the accident happened on the 6th or 7th of April, but it is wholly immaterial.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

have been in reply. In these circumstances we think the record is not in condition to enable us to pass on the question intelligently. In any event, considering all the evidence in the record, we think we would not be warranted in disturbing the verdict or judgment.

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There is considerable evidence and argument in the briefs as to whether the accident happened on the 6th or 7th of April, but it is wholly immaterial.

The judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McGurchy and Matchett, JJ., concur.

39516

In the Matter of the Estate of
EDITH ROCKEFELLER McCORMICK,
Deceased.

On Appeal of MAURICE B. RISSMAN and LOUIS W. ADAMS, as co-trustees under and by virtue of certain Deeds of Trust of March 31, 1933, and August 16, 1933, and MAURICE B. RISSMAN as sole trustee under and by virtue of the certain Trust Indenture dated June 2, 1933,

Appellants,

vs.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as Executor under the Last Will and Testament of Edith Rockefeller McCormick, Deceased, and McCORMICK MEMORIAL INSTITUTE FOR INFECTIOUS DISEASES,

Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

295 I.A. 621

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Claimants, assignees of Edwin D. Krenn, filed a claim in the Probate court against the estate of Edith Rockefeller McCormick, deceased, for $1,261,128, with interest; after a hearing the Probate court denied the claim except as to three promissory notes of Mrs. McCormick amounting, with interest, to something over $77,000; appeal was taken to the Circuit court where a trial de novo was had; the trial court, after hearing evidence, reached the same conclusion and denied the claim except as to the promissory notes referred to. Claimants appeal to this court.

As noted in the title of the case, one of the parties opposing this claim is the McCormick Memorial Institute for Infectious Diseases. This is a charitable institution founded by Edith Rockefeller McCormick and Harold F. McCormick in 1902 in memory of their son, John Rockefeller McCormick. It filed its claim in the Probate court against Mrs. McCormick's estate, which was allowed for

In the matter of the estate of
EDWIN MOORHEAD McCORMICK,
Deceased.

On Appeal of MAURICE B. HIRSCH and LOUIS V. GLASS, as co-trustees under and by virtue of certain Deeds of Trust of March 27, 1933, and August 16, 1933, and MAURICE I. HIRSCH as sole trustee under and by virtue of the certain Trust Indenture dated June 2, 1933,

Appellants,

vs.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as trustee under the last Will and Testament of Edith Rockefeller McCormick, Deceased, and McCORMICK MEMORIAL INSTITUTE FOR INFECTIOUS DISEASES,

Appellees.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

295 I.A. 621

MR. JUSTICE McGURREY DELIVERED THE OPINION OF THE COURT.

Claimants, assignees of Edwin D. Green, filed a claim in the probate court against the estate of Edith Rockefeller McCormick, deceased, for $1,291,125, with interest; after a hearing the probate court denied the claim except as to three promissory notes of Mrs. McCormick amounting, with interest, to somewhat over $77,000; appeal was taken to the Circuit court where a trial de novo was had; the trial court, after hearing evidence, reached the same conclusion and denied the claim except as to the promissory notes referred to. Claimants appeal to this court.

As noted in the title of the case, one of the parties opposing this claim is the McCormick Memorial Institute for Infectious Diseases. This is a charitable institution founded by Edith Rockefeller McCormick and Harold F. McCormick in 1902 in memory of their son, John Rockefeller McCormick. It filed its claim in the probate court against Mrs. McCormick's estate, which was allowed for

$697,438, and on motion it was permitted to participate in the defense to the instant claim.

The basis of the claim, except as to these notes and a personal loan of $6000 said to have been made by Krenn to Mrs. McCormick, is that Krenn December 30, 1930, delivered to the Edith Rockefeller McCormick Trust, a common law trust of which Mrs. McCormick was virtually the sole beneficial owner, 7000 shares of Standard Oil Company of New Jersey common stock, and April 4, 1931, some Milwaukee County Metropolitan Sewerage bonds. Claimants say that these securities were transferred to the Trust at Mrs. McCormick's request, for her personal benefit and as a loan to her; that April 13, 1931, Krenn turned over to an escrowee other securities having a market value of $865,000, and that these securities were likewise deposited with the Trust at Mrs. McCormick's request, for her benefit and as a loan to her; that she thus became obligated to Krenn for the return of all these securities or the payment of their fair market value and her notes aggregating $1,261,128, with interest; that they had never been returned to Krenn but were wholly lost to him.

Claimants say that Mrs. McCormick obligated herself, personally, for the return of Krenn's securities or the payment of their market value as of the dates they were delivered to the Trust; that this is evidenced by her oral statements to Krenn and to others and by certain language appearing in three wills subsequently executed by her. The Circuit court trial Judge found that the evidence did not support this claim and found that these securities were lent to the McCormick Trust and not to Mrs. McCormick, who was not personally liable for their return or their value. The record before us supports this conclusion.

Mrs. McCormick was a daughter of the late John D.Rockefeller; she died August 25, 1932, leaving a last will, naming the Chicago

$897,438, and on motion it was permitted to participate in the defense to the instant claim.

The basis of the claim, except as to these notes and a personal loan of $8000 said to have been made by Krenn to Mrs. McCormick, is that Krenn December 30, 1930, delivered to the Edith Rockefeller McCormick Trust, a common law trust of which Mrs. McCormick was virtually the sole beneficial owner, 7000 shares of Standard Oil Company of New Jersey common stock, and April 4, 1931, some Milwaukee County Metropolitan Sewerage bonds. Claimants say that these securities were transferred to the Trust at Mrs. McCormick's request, for her personal benefit and as a loan to her; that April 15, 1931, Krenn turned over to an escrowee other securities having a market value of $865,000, and that these securities were likewise deposited with the Trust at Mrs. McCormick's request, for her benefit and as a loan to her; that one time became obligated to Krenn for the return of all these securities or the payment of their fair market value and her notes aggregating $1,201,128, with interest; that they had never been returned to Krenn but were wholly lost to him.

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Mrs. McCormick was a daughter of the late John D.Rockefeller; she died August 25, 1932, leaving a last will, naming the Chicago

Title and Trust Company as executor; for many years prior to her death Krenn had been her close friend and had been the recipient from her of large sums of money and valuable jewelry.

The Edith Rockefeller McCormick Trust (hereafter called the Trust) was organized October 1, 1923, after the pattern of the so-called Massachusetts Trust; the three trustees were Mrs. McCormick, Krenn and Edward A. Dato, his partner in the real estate business. The trust agreement provided that there should be no personal liability of the trustees and that all persons dealing with the Trust must look only to it for payment of their claims. The primary purpose of the Trust was to acquire, subdivide and sell real property and construct buildings thereon; it started with capital of stocks and cash aggregating $5,235,000, divided into 52,350 shares, of which Mrs. McCormick held 52,320, Krenn 15 and Dato 15 shares; Mrs. McCormick subsequently made additional contributions to the capital stock aggregating over $10,000,000.

July 1, 1929, the trustees of the Trust entered into a Collateral Trust Indenture with the Foreman Trust and Savings Bank, as trustee, to secure $11,000,000 of its collateral gold notes, and pledged with the bank, as trustee, bonds, stocks and other securities, most of which were the property of Mrs. McCormick. The Trust agreed to maintain at all times with the bank trustee cash or marketable securities of the fair market value of not less than 130 per cent. of the principal amount of the gold notes outstanding. At the same time Mrs. McCormick executed a guaranty with the bank, as trustee, guaranteeing the performance by the Trust of the terms of the Indenture securing the $11,000,000 gold note issue and their prompt payment, both principal and interest. These notes were sold to the public by the Foreman-State Corporation of Chicago and the Guaranty Trust Company of New York.

In December, 1930, the Trust found it was in need of funds;

Title and Trust Company as executor; for many years prior to her death Krenn had been her close friend and had been the recipient from her of large sums of money and valuable jewelry.

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The primary purpose of the trust was to acquire, subdivide and sell real property and construct buildings thereon; it started with capital of stocks and bonds aggregating $5,235,000, divided into 52,350 shares, of which Mrs. McCormick held 52,320, Krenn 15 and Dato 15 shares; Mrs. McCormick subsequently made additional contributions to the capital stock aggregating over $10,000,000.

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In December, 1930, the Trust found it was in need of funds;

the Foreman bank was requesting that more stock be pledged to secure the Trust loans; for the purpose of meeting this request, Krenn on December 30, 1930, lent to the Trust 7000 shares of stock of the Standard Oil Company of New Jersey; 2000 shares were subsequently returned to him; the remaining 5000 shares were alleged to have been worth $225,000.

January 20, 1931, Krenn lent Mrs. McCormick $30,000 in cash, for which she gave her demand note. This has been allowed by the trial court and there is no dispute about this.

In March, 1931, the Trust received notice from the bank trustee that an appraisal of the securities deposited as collateral security for the gold notes showed that their fair market value was less than the 130 per cent ratio required by the Indenture. The vice-president had an interview with Mrs. McCormick and advised her that defaults must be made good, in accordance with the requirements of the Trust Indenture; Mrs. McCormick told him she was not financially able to put up additional securities.

April 4, 1931, Krenn lent to the Trust the Milwaukee County Metropolitan Sewerage bonds, alleged to have been worth $100,000.

April 13, 1931, Krenn lent to the Trust various additional securities alleged to have been worth $865,128.

Claimants say that on January 4, 1932, Krenn lent Mrs. McCormick $6000 cash, receiving no writing as evidence.

January 5, 1932, Krenn lent her $20,000 cash, receiving her note, and May 15th lent her $15,000 cash, receiving her note. All of these items evidenced by notes have been allowed and there is no dispute as to them.

Krenn and Mrs. McCormick were apparently careful to have written evidence of the cash advances to her. Her notes, payable on demand, were given in each case except as to the $6000 item. We would naturally expect, therefore, that there would be some

the Foreman bank was requesting that more stock be pledged to secure the Trust loans; for the purpose of meeting this request, Kremn on December 30, 1930, lent to the Trust 7000 shares of stock of the Standard Oil Company of New Jersey; 2000 shares were subsequently returned to him; the remaining 5000 shares were alleged to have been worth $225,000.

January 20, 1931, Kremn lent Mrs. McCormick $50,000 in cash, for which she gave her demand note. This has been allowed by the trial court and there is no dispute about this.

In March, 1931, the Trust received notice from the bank trustee that the aggregate of the securities deposited as collateral security for the gold notes showed that their fair market value was less than the 150 per cent ratio required by the indenture. The vice-president had an interview with Mrs. McCormick and advised her that defaults must be made good, in accordance with the requirements of the Trust Indenture; Mrs. McCormick told him she was not financially able to put up additional securities.

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Kremn and Mrs. McCormick were apparently careful to have written evidence of the cash advances to her. Her notes, payable on demand, were given in each case except as to the $6000 item. One would naturally expect, therefore, that there would be some

writings evidencing the character of the transfer of securities made by Krenn, and such writings are in the record. The transfer on December 30, 1930, of 7000 shares of Standard Oil Company stock was by a written instrument providing that Krenn "does hereby sell, assign, transfer, set over and deliver unto the Edith Rockefeller McCormick Trust" the 7000 shares of stock.

On that date the trustees of the Trust, that is, Mrs. McCormick, Krenn and Dato, held a meeting; the minutes recite that Mrs. McCormick advised the trustees "that the Trust had obtained from Krenn a loan of 7000 shares" of Standard Oil Company stock and that Krenn wished "an acknowledgment by the Trust of said loan." Such acknowledgment was made in writing, reciting that in consideration of Krenn's loan to the Trust of the 7000 shares of Standard Oil Company stock, "the Trust will satisfy when due any liability arising by virtue of the loan which Trust will use said stock to secure ...." The Trust agreed that upon the payment of its loan from the Foreman bank, it would cause the shares of stock to be returned to Krenn promptly.

The following day, at another meeting of the trustees of the Trust, Mrs. McCormick stated she wished the loan "to be repaid by Trust to Krenn at as early a date as possible." The minutes show further that the trustees resolved that the Krenn loan was not a voluntary payment of additional capital to the Trust, "but as a loan in the nature of an advance by Krenn to this Trust estate," which loan was to be repaid to Krenn by the Trust estate as quickly as possible.

The balance sheet of the Trust for December 31, 1930, shows as an asset the Krenn securities, and on the liability side "Edwin D. Krenn securities - contra $329,875."

April 4, 1931, when Krenn assigned $125,000 par value of Milwaukee County Metropolitan Sewerage Bonds to the Trust, documents

writings evidencing the character of the transfer of securities made by Krenn, and such writings are in the record. The transfer on December 30, 1926, of 7000 shares of Standard Oil Company stock was by a written instrument providing that Krenn "does hereby sell, assign, transfer, set over and deliver unto the Lincoln Bondselling Corporation Trust" the 7000 shares of stock.

On that date the trustees of the trust, that is, Krenn, McCormick, Krenn and Fito, held a meeting; the minutes recite that McCormick advised the trustees "that the Trust had obtained from Krenn a loan of 7000 shares" of Standard Oil Company stock and that Krenn signed "an acknowledgment by the Trust of said loan." Such acknowledgment was made in writing, recalling that in consideration of Krenn's loan to the trust of the 7000 shares of Standard Oil Company stock, "the trust will satisfy when its by liability arising by virtue of the loan which Krenn will use said stock to secure ...." The trust agreed that upon the payment of its loan from the Foreman bank, it would cause the shares of stock to be returned to Krenn properly.

The following day, at another meeting of the trustees of the Trust, Mr. McCormick stated she wished the loan "to be repaid by Trust to Krenn at as early a date as possible." The minutes show further that the trustees resolved that the Krenn loan was not a voluntary payment of additional capital to the Trust, "but as a loan in the nature of an advance by Krenn to this Trust estate," which loan was to be repaid to Krenn by the Trust estate as quickly as possible.

The balance sheet of the trust for December 31, 1930, shows as an asset the Krenn securities, and on the liability side "Edwin D. Krenn securities - contra $320,875."

April 4, 1931, when Krenn assigned $120,000 par value of Kilgannon County Metropolitan Sewerage Bonds to the Trust, documents

were executed substantially in the same form as was used in the Krenn loan of December 30th, and the Trust again executed acknowledgment of the loan to the Trust. The loan by Krenn to the Trust on April 13, 1931, of other securities said to be worth $865,128, was evidenced by a number of instruments signed by the three trustees of the Trust. One recited that the Trust had become involved in financial difficulties and it was necessary that securities be deposited with Dato as escrowee, for the use of the Trust. The agreement recited that as the parties were interested in the affairs of the Trust they desired to place his and her holdings in this escrow to assist the Trust. At this meeting Mrs. McCormick again stated she wished Krenn to be protected by the return of or payment for the securities he had placed under the escrow agreement. There were various other writings showing resolutions by the trustees of the Trust, and Journal entries and balance sheets, in all of which the advances by Krenn are described as loans to the Trust.

October 19, 1932, Krenn and Dato wrote to the Chicago Title and Trust Company referring to "the original claim of Krenn against McCormick Trust for approximately $1,200,000 in securities loaned by Krenn to McCormick Trust."

In all of the transactions involving the loans of securities by Krenn, the documents executed by him and Mrs. McCormick and Dato showed conclusively that the parties understood at the time that the advances by Krenn were to the Trust.

Claimants seek to overcome this written evidence that the securities were lent to the Trust and not to Mrs. McCormick by the testimony of witnesses as to certain oral expressions made by Mrs. McCormick which are said to indicate that she had either borrowed the securities or was personally liable for them. Edward P. Connelly, bookkeeper of the Trust and also for Krenn & Dato, testified that Mrs. McCormick, in discussing what entries should be made on the

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books of the Trust with reference to the obligation of the Trust to Krenn, said, "It was to be considered her indebtedness and that she would repay Mr. Krenn," and yet the book entries of the Trust, presumably made by Connelly, showed that the loan was to the Trust and was listed among the liabilities of the Trust. Connelly further testified that Mrs. McCormick asked Krenn to lend her his securities to help the Trust and that Krenn replied he "would loan them to her on her responsibility." Connelly further said that he did not undertake to remember word for word what was said at the time.

It is hardly credible that if Mrs. McCormick was liable to Krenn the written records would fail to show, either directly or by inference, any such liability. Connelly was testifying two and a half years after the conversation he was attempting to describe. His own entries in the books of the Trust contradict his recollection of this conversation which took place before the trustees' meeting. As a bookkeeper Connelly must have known that his entries, made after this alleged conversation, would show the actual transaction, and they show no liability of Mrs. McCormick but solely that of the Trust.

Other witnesses testifying for claimants were, for the most part, social acquaintances of Mrs. McCormick. Their testimony tended to show that she frequently referred to what Krenn had done for her; that he had given her his entire savings from the time he had arrived in America. These rather glowing statements of Mrs. McCormick can be readily explained by her failure, in talking informally to friends, to distinguish between the Trust and herself. The loans to the Trust were largely for her benefit, hence she could refer to them as something done for her. Such a locution is a commonplace with business men owning or controlling corporations. Mrs. Lewis, one

books of the Trust with two notes to the obligation of the Trust to Krenn, said, "It was to be considered her indebtedness and that she would repay Mr. Krenn," and yet the book entries of the Trust, previously made by connelly, showed that the loan was to the Trust and was listed among the liabilities of the Trust. Connelly further testified that Mrs. Mooseriek asked Krenn to lend her his securities to help the Trust and that Krenn replied he "would loan them to her on her responsibility." Connelly further said that he did not undertake to remember word for word what was said at the time.

It is hardly credible that if Mrs. Mooseriek was liable to Krenn the written records would fail to show, either directly or by inference, any such liability. Connelly was testifying two and a half years after the conversation he was attempting to describe. His own entries in the books of the Trust contradict his recollection of this conversation which took place before the trustees' meeting. As a bookkeeper Connelly must have known that his entries, made after this alleged conversation, would show the actual transaction, and they show no liability of Mrs. Mooseriek but solely that of the Trust.

Other witnesses testifying for claimants were, for the most part, social acquaintances of Mrs. Mooseriek. Their testimony tended to show that she frequently referred to what Krenn had done for her; that he had given her his entire savings from the time he had arrived in America. These rather glowing statements of Mrs. Mooseriek can be readily explained by her failure, in talking informally to friends, to distinguish between the Trust and herself. The loans to the Trust were largely for her benefit, hence she could refer to them as something done for her. Such a location is a commonplace with business men owning or controlling corporations. Mrs. Lewis, one

of the witnesses, indicated that Mrs. McCormick was referring to the Trust, by stating that so many persons could not pay her, evidently referring to the numerous persons who were indebted to the Trust. This testimony of oral statements by Mrs. McCormick did not overcome the proof shown by the records.

Claimants argue earnestly that their position is supported by language appearing in each of three wills executed by Mrs. McCormick. The first of these was executed June 10, 1931, not long after Krenn had lent his securities to the Trust. This will provided for a preferred legacy of $2,000,000 for Krenn and contained this provision:

> "The said Edwin D. Krenn has, for the purposes of the Edith Rockefeller McCormick Trust, loaned to or produced for the benefit of said Trust, certain securities amounting to a considerable sum in value. I direct my Executor to assume all liability of said Trust to said Edwin D. Krenn for said securities, and to pay him out of my estate, in satisfaction of such liability, the full fair cash value of said securities at the time of such repayment."

Mrs. McCormick's direction that her executor assume all liability of the Trust to Krenn indicates that she did not at the time of his loan of securities to the Trust recognize any personal liability to Krenn; that she fully understood at that time that the loans to the Trust created no liability against her.

There is force in the argument that if Mrs. McCormick was not personally indebted to Krenn June 10, 1931, when this will was executed, no subsequent occurrence could create any liability arising from the three loans made to the Trust, which occurred before the date this will was executed.

Claimants say that Mrs. McCormick realized that this language of June 10th was an error and that she undertook to correct this in her new will, executed July 3, 1931. Counsel for defendants suggest that the reason for the short interval between the wills was that the Foreman bank, named as executor of the first will, was taken

of the witnesses, indicated that Mrs. Goodrich was returning to the Trust, by stating that so many persons could not pay it, evidently referring to the numerous persons who were indebted to the Trust. This testimony of oral statements by Mrs. Goodrich did not overcome the proof shown by the records.

Claimants argue earnestly that their position is supported by language appearing in each of three wills executed by Mrs. Goodrich. The first of these was executed June 10, 1921, not long after Kreen had lost his securities to the Trust. This will provided for a preferred legacy of $[illegible],000 for Kreen and contained this provision:

> "The said Edwin E. Kreen has, for the purposes of the dealings Hockenfeller Goodrich Trust, loaned to or produced for the benefit of said Trust, certain securities amounting to a considerable sum in value. I direct my Executor to assume all liability of said Trust to said Edwin E. Kreen for said securities, and to pay him out of my estate, in satisfaction of such liability, the full fair cash value of said securities at the time of such repayment."

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Claimants say that Mrs. Goodrich retained that language of June 10th was a error and that she undertook to correct this in her new will, executed July 3, 1921. Counsel for defendants suggest that the reason for the short interval between the wills was that the Foreman bank, named as executor of the first will, was taken

over by the First National Bank, and Mrs. McCormick thought it necessary to redraw her will in order to name a competent executor.

The will of July 3rd contains a paragraph written by the late Judge Cutting, admittedly an expert in drafting wills. This paragraph reads that "said Edwin D. Krenn has, for the purposes of the Edith Rockefeller McCormick Trust, loaned to me personally for the benefit of said Trust, certain securities amounting to a considerable sum in value, to-wit, about one million dollars ($1,000,000)." Claimants argue that this indicates clearly Mrs. McCormick's understanding of her obligation to Krenn.

Obviously, the clause in the will of June 10th and that in the one of July 3rd, are inconsistent. The first will was drawn nearer to the time when the transactions occurred. The will of July 3rd is inconsistent with the contemporaneous written records of the loans to the Trust and with the theory of claimants, which is that a loan was made to the Trust at the request and for the benefit of Mrs. McCormick, while the will of July 3rd refers to a loan "to me personally."

However it is not necessary to analyze closely these respective wills, for in her final will, executed August 4, 1932, three weeks before her death, Mrs. McCormick revoked her former wills and gave Krenn, as a legatee, 5/12ths of her residuary estate.

It should be noted that in a prior will made by Mrs. McCormick, dated February 17, 1931, she had confidence that her estate was amply solvent, as she made large charitable bequests. This confidence is also reflected in the wills of June 10th and July 3, 1931, but in the last will of August 4, 1932, Mrs. McCormick evidently realized that her fortune had been dissipated, as there were no charitable bequests. It simply provided that after her debts were paid the remainder should be divided, 7/12ths to her three children, and 5/12ths to Krenn.

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The will explains why she left this large legacy to Krenn, saying "because I am justly indebted to the said Edwin D. Krenn for large sums of money and securities loaned by him to me at my request, and the amount hereby given him will not fully compensate him for the loss which he has and will sustain by reason of such debts, loans and advances to me from time to time."

Counsel for claimants argue that this is a recognition of personal liability to Krenn. To this it may be said that this final will revoked the July 3rd will, which had expressly recognized a personal liability to Krenn. Moreover, Mrs. McCormick had a strong feeling of friendship for Mr. Krenn, and realizing that he had lost most, if not all, of his fortune in their joint enterprise, made this generous provision for him as a legatee in her last will, with an explanation as to why she did so.

Claimants urge that it was unbelievable that a reasonable person, such as Krenn is presumed to be, would transfer all his fortune to the Trust, realizing that it was in a precarious condition. A number of reasons are presented which would reasonably move Krenn to make these loans to the Trust. He knew that a considerable part if not all of Mrs. McCormick's large fortune was in the Trust; she had in the past shown him great kindness; for a period of approximately eight years prior to April 1, 1931, she had made gifts to him amounting almost to $1,600,000; in fact most, if not all, the assets lent by Krenn were the result of gifts made by Mrs. McCormick to him. It would seem strange if under such circumstances Krenn would refuse to help his benefactress, whose fortune was threatened.

Moreover, a perhaps more potent reason moving Krenn to assist the Trust is seen when the relationship of Krenn & Dato with the McCormick Trust is examined. Krenn & Dato was a partnership, afterward incorporated; the Trust employed Krenn & Dato as

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Moreover, a perhaps more potent reason moving Krenn to assist the Trust is seen when the relationship of Krenn & Dato with the McCormick Trust is examined. Krenn & Dato was a partnership, afterward incorporated; the Trust employed Krenn & Dato as

its exclusive agent for acquiring, managing, operating and disposing of the Trust properties - largely subdivided real estate - Krenn & Dato to receive 15 per cent of the total sale price of any lot or parcel of real estate, 35 per cent of the gross sales price of subdivision property, with what is called a "management commission" of 15 per cent of the gross income of the Trust. This proved to be a highly profitable arrangement for Krenn & Dato. Its net earnings from 1924 to 1930 were slightly under $2,000,000, while the net loss of the McCormick Trust for the last four years of the same period was over $2,350,000. The capital stock of Krenn & Dato, Inc., increased from a little over $400,000 at the end of 1924 to nearly $3,000,000 at the end of 1930, while in the same period the McCormick Trust sank from $7,500,000 to something over $4,000,000. Analysis of various other transactions shows that while the agreement was a very profitable one to Messrs. Krenn and Dato, it was a losing venture to Mrs. McCormick. There was ample evidence that Krenn had a substantial financial reason for assisting the Trust by making the loans to it.

Claimants next say that Mrs. McCormick was liable to Krenn, by operation of law, to the extent that notes, upon which she was a guarantor were discharged by the sale of the Krenn securities; that these securities became sureties of Mrs. McCormick at her request, and Krenn was therefore subrogated to the claim of the original creditors against her to the extent that her obligation was paid off from the proceeds of his collateral. It is pointed out that Mrs. McCormick was a guarantor of the $11,000,000 Trust notes secured by the Collateral Indenture above referred to; that a default in its requirements meant the accrual of her liability as guarantor of this entire obligation; that it became necessary to deposit a large sum of money with the trustee under the Indenture securing the note issue, and accordingly Mrs. McCormick and the Trust, as joint makers,

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executed their negotiable note payable to the Foreman-State National Bank for the amount necessary to cure the default, and deposited as collateral security the collateral deposited under the escrow agreement of April 13, 1931, practically all of which belonged to Krenn. This note was paid April 20, 1931, and the collateral returned to Dato as escrowee, but it became necessary to effect further redemption of the outstanding Trust notes to secure further bank loans, and the Trust borrowed $350,000 from the Continental Illinois Bank & Trust Co., which was guaranteed by Mrs. McCormick, and there was deposited as collateral for this a good part of Krenn's collateral which he had transferred to the Trust. Other somewhat similar transactions are noted in which the Trust deposited as collateral the securities transferred to it from Krenn.

It is argued that these transactions show that Krenn's securities stood in the position of a surety for Mrs. McCormick, and therefore, to the extent that his collateral discharged her obligations to the banks, he is entitled to be subrogated to the claims of the banks against Mrs. McCormick. Claimants cite cases holding that one, whose property is applied by others to the satisfaction of a debt, is subrogated to the rights of the creditor, 60 C. J. 821, sec. 122; Price v. Dime Savings Bank, 124 Ill. 317, 324, and many other cases.

This cause of action is entirely different from that filed in the Probate court. The claim filed in that court is based on alleged loans of securities by Krenn to Mrs. McCormick. The theory of subrogation was not presented until the cause was in the Circuit court on appeal. There is ample authority for holding that when claimants failed in the Probate court to prove their claim of a loan to Mrs. McCormick, they cannot assert for the first time in the Circuit court or in this court that Krenn was subrogated to the rights of the banks who were creditors of Mrs. McCormick. Cairo

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Meal & Cake Co. v. Estate of Brigham, 268 Ill. App. 510; Marer & Co. v. Estate of Wolford, 273 Ill. App. 305, 317-18; In re Estate of Schwartz, 286 Ill. App., 310, 314-16; Williams v. Frederick, 289 Ill. App., 410, 417.

However, there are definite objections to the theory of subrogation. While in the resolutions and records of the Trust the advances by Krenn are described as loans, the records show also that the Trust was to repay these loans "either in kind or by cash in an amount equal to the fair market value" of the securities on the dates of their transfer. Thus the Trust had the option to return the identical securities or retain them and give securities of equal value or cash.

In Maxcy-Barton Organ Co. v. Glen Corp., 355 Ill. 228, the title to a pipe organ was in dispute; it was argued that the contract of sale, which provided that title should remain in the seller until the property was paid for, constituted a bailment; the court held otherwise, for the reason that the vendees in the contract were not obligated to return the property but could discharge the obligation by payment of the price named in the contract. The general rule was stated to be (page 241) that if the contract does not require the party receiving the property to return the identical property but permits the possessor to return other property of equal value or to pay the money value thereof, the title to the property passes to the possessor, citing Lonergan v. Stewart, 55 Ill. 44; Chickering v. Bastress, 130 Ill. 206; People v. Wildeman, 325 Ill. 99. See also The People v. Robinson, 352 Ill. 596, 600. It follows that the title to the securities transferred by Krenn was in the Trust and not in Krenn. The Trust, having the title to the securities and owning them, pledged them as collateral for its bank loans. Krenn did not own the securities when they were pledged and therefore had no rights of subrogation to the claims of the creditors of Mrs. McCormick.

In Nelson v. Colegrove & Co. State Bank, 354 Ill. 408,

Neal & Dale Co. v. Estate of Bridgman, 265 Ill. App. 210; Harper & Co. v. Estate of Wolfard, 273 Ill. App. 395, 317-18; In re Estate of Schwartz, 288 Ill. App., 310, 314-16; Williams v. Frederick, 289 Ill. App., 410, 417.

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In Maxey-Burton Organ Co. v. Olsen Corp., 355 Ill. 228, the title to a pipe organ was in dispute; it was argued that the contract of sale, which provided that title should remain in the seller until the property was paid for, constituted a bailment; the court held otherwise, for the reason that the vendees in the contract were not obligated to return the property but could discharge the obligation by payment of the price named in the contract. The general rule was stated to be (page 241) that if the contract does not require the party receiving the property to return the identical property but permits the possessor to return other property of equal value or to pay the money value thereof, the title to the property passes to the possessor, citing Donegan v. Stewart, 53 Ill. 44; Chickering v. Bastress, 130 Ill. 208; People v. Wildeman, 328 Ill. 93. See also The People v. Robinson, 352 Ill. 396, 400. It follows that the title to the securities transferred by Krenn was in the Trust and not in Krenn. The Trust, having the title to the securities and owning them, pledged them as collateral for its bank loans. Krenn did not own the securities when they were pledged and therefore had no rights of subrogation to the claims of the creditors of Krenn. McCormick.

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Shamel delivered to the bank certain bonds, to be pledged by the bank as security for the deposit of State funds upon an agreement to return the bonds or pay their principal amount to Shamel; the bank became insolvent and the State treasurer sold enough of the bonds delivered by Shamel to satisfy the bank's indebtedness to the State; Shamel filed a petition in the receivership case, claiming that upon payment of the bank's indebtedness to the State by sale of his bonds he became subrogated to the State's right of priority in payment to the extent the proceeds of the sale satisfied that indebtedness. The court held that the deposit by Shamel of his bonds was not a bailment and the bonds were the property of the bank, and Shamel had no right of subrogation. A similar case is Kocher v. Kocher, 56 N. J. Eq. 547, where it was held that the son, who had lent his father money, was simply a creditor and could not claim subrogation.

It should be emphasized that the banks which lent money dealt with the Trust and not with Krenn. They lent money to the Trust, secured by securities belonging to the Trust. That Krenn at one time owned these securities is of no importance, as the relationship between the Trust and him was that of debtor and creditor. Krenn was not surety for the bank loans. Moreover, there is no showing that Mrs. McCormick requested that Krenn's securities should be pledged. All of the documents show that the transfer of the securities by Krenn to the Trust, described as a loan, in law amounted to a sale, and the Trust used these securities as it would use any other property owned by it.

The claim of a cash loan of $6000 by Krenn to Mrs. McCormick rests solely on the evidence of the bookkeeper, Connelly. He testified that this cash loan was made on January 4, 1932. No note was produced evidencing such loan, although Mrs. McCormick signed a note for $20,000, payable to Krenn, the very next day.

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It should be emphasized that the banks union lent money dealt with the Trust and not with Krenn. They lent money to the Trust, secured by securities belonging to the Trust. The Krenn at one time owned these securities is of no importance, as the relationship between the Trust and him was that of debtor and creditor. Krenn was not surety for the bank loans. Moreover, there is no showing that Mr. Goodrich requested that Krenn's securities should be pledged. All of the documents show that the transfer of the securities by Krenn to the Trust, described as a loan, in fact amounted to a sale, and the Trust held these securities as it would use any other property owned by it.

The claim of a cash loan of $6000 by Krenn to Mr. Goodrich rests solely on the evidence of the bookkeeper, Connally. He testified that this cash loan was made on January 4, 1932. No note was produced evidencing such loan, although Mr. Goodrich signed a note for $20,000, payable to Krenn, the very next day.

He also held two other notes signed by Mrs. McCormick. The court could properly conclude either that this amount was included in the loan of $20,000 or that the parties considered it as a gift rather than a loan. This view is supported by the letter of Krenn to the Chicago Title & Trust Co., dated October 19, 1932, in which Krenn states his claim against Mrs. McCormick, for which he holds her notes aggregating $65,000, but makes no reference to any loan of $6000.

The fact that two trial courts have held against this claim is entitled to weight. In re Estate of Swift, 267 Ill. App. 224, 236; In re Estates of Antkowski, 286 Ill. App. 184, 190. Also applicable is the well known rule that, where a trial court sees the witnesses and hears them testify, its conclusion will not be set aside unless manifestly against the weight of the evidence.

We hold from a consideration of the entire record that claimants have failed to support their claim, and the judgment of the Circuit court is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

He also held two other notes signed by Mrs. McCormick. The court could properly conclude either that this account was included in the loan of $50,000 or that the parties considered it as a gift rather than a loan. This view is supported by the letter of Frenn to the Chicago Title & Trust Co., dated October 19, 1952, in which Frenn states his claim against Mrs. McCormick, for which he holds her notes aggregating $68,000, but makes no reference to any loan of $60,000.

The fact that two trial courts have held against this claim is entitled to weight. In re Estate of Swift, 307 Ill. App. 234, 236; In re Estates of Mitchell, 268 Ill. App. 164, 170. Also applicable is the well known rule that, where a trial court sees the witnesses and hears them testify, its conclusion will not be set aside unless manifestly against the weight of the evidence.

We hold from a consideration of the entire record that claimants have failed to support their claim, and the judgment of the Circuit court is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39951

ALICE JEAN HALLADAY, Appellee, vs. OLYMPIA FIELDS COUNTRY CLUB, a Corporation, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

295 I.A. 622

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for damages alleging that while riding on a toboggan slide owned, operated and maintained by the defendant she was injured through the defective condition of the slide; upon trial she had a verdict for $20,000. Defendant appeals from the judgment entered on the verdict.

Defendant owns over 700 acres of land near Chicago upon which are a clubhouse and four golf courses maintained by it. The slide was erected on the ground of defendant not far from its clubhouse.

The accident happened in the afternoon of December 29, 1935; it was a cold day with the sun shining and about five inches of snow on the ground. The slide was the usual type - a wooden structure rising about 35 feet from the ground, with a slide or chute running from the top at an angle toward the gr und; the surface of the chute is covered with snow, then sprinkled with water and allowed to freeze; at the bottom of the incline there were six inch boards on the sides to hold the toboggan sled on the slide; these extended on the level ground for about 400 feet; persons using the slide embarked at the top on a toboggan sled which then ran down the slide and some distance on the ground.

Plaintiff was invited by Mrs. Carver, a member of defendant club, to be one of a party to use the slide on Sunday afternoon, December 29th; plaintiff with Mrs. Carver and a few friends arrived

ALICE JANE PLAINTIFF, Appellee,	
vs.	
CELESTIA FLUSS COUNTRY CLUB, a Corporation, Appellant.	

295 I.A. 622

WM. JUSTICE MCDONALD PRESIDING AS ARBITRATOR OF THE COURT.

Plaintiff brought suit for damages alleging, that while sliding on a toboggan slide owned, operated and maintained by the defendant she was injured through the defective condition of the slide; upon trial she had a verdict for $10,000. Defendant appeals from the judgment entered on the verdict.

Defendant owns over 700 acres of land over Chicago upon which are a clubhouse and four golf courses maintained by it. The slide was erected on the ground of defendant not far from its clubhouse.

The accident happened in the afternoon of December 6, 1928; it was a cold day with the sun shining and about five inches of snow on the ground. The slide was the usual type - a wooden structure rising about 15 feet from the ground, with a slide or chute reaching from the top of an angle toward the ground; the surface of the chute is covered with snow, then sprinkled with water and allowed to freeze; at the bottom of the incline there are six inch boards on the sides to hold the toboggan slid on the slide; these extended on the level ground for about 40 feet; persons using the slide embarked at the top in a toboggan and slid down the slide and came sliding on the ground.

Plaintiff was invited by Mrs. Carter, a member of defendant club, to be one of a party to use the slide on Sunday afternoon, December 6th; plaintiff with Mrs. Carter and a few friends arrived

at the club in the early afternoon; plaintiff's husband bought tickets for the slide for the entire party, paying 25¢ apiece for them; they went to the top of the slide and one of the party, a Mr. Bassett, sat on the front part of the toboggan sled, plaintiff came next, and a Mr. Webber, another member of the party, sat behind plaintiff and they descended the slide. There was evidence tending to show that at the bottom of the slide at about the point where the level ground began the sled hit a bump which caused plaintiff and Mr. Bassett to be thrown about six inches in the air and rebound with great force. Plaintiff testified that she suffered from a severe pain in the back and that when the sled stopped she was unable to rise from it and was carried for a distance and then helped into the clubhouse where she lay for about half an hour. Plaintiff testified that she received severe injuries to her spine.

Defendant first argues that the trial court committed reversible error in permitting plaintiff's attorney to make known to the jurors on their voir dire that defendant carried liability insurance. Plaintiff followed much the same procedure as was adopted by the attorneys for the plaintiff in Smithers v. Henriques, 287 Ill. App. 95, 100, affirmed by the Supreme court on April 15, 1938. Plaintiff's counsel in the present case presented a motion for leave to question prospective jurors as to their financial interest, if any, in the Bankers Indemnity Insurance Company; this motion was supported by an affidavit by an attorney associated with plaintiff's attorney that he was informed and believed that defendant carried liability insurance in the named company and that the attorneys for that company were acting as attorneys for defendant in the trial of the case, and that the insurance company will pay any judgment that may be entered against defendant; that the interests of plaintiff would be prejudiced if her counsel was not allowed to inquire of prospective jurors as to their financial interest, if any, in the insurance

at the pool in the early afternoon; plaintiff's husband began picnicking for the girls for the entire party, paying $2½ apiece for them; they went to the top of the slide was one of the party, a Mr. Bennett, sat in the front part of the toboggan slide, plaintiff was next, and a Mr. Weber, another member of the party, sat behind plaintiff and they descended the slide. There was evidence tending to show that at the bottom of the slide at about the point where the level ground began the sled hit a bump which caused plaintiff and Mr. Bennett to be thrown about six inches in the air and rebounded with great force. Plaintiff testified that she suffered from a severe pain in the back and that when the sled stopped she was unable to rise from it and was carried for a distance and then turned into the clubhouse where she lay for about half an hour. Plaintiff testified that she received severe injuries to her spine.

Defendant first argues that the trial court committed reversible error in permitting plaintiff's attorney to make known to the jurors as their sole interest in the outcome of the case. Plaintiff followed much the same procedure as was adopted by the attorneys for the plaintiff in Williams v. Montgomery, 287 Ill. App. 98, 100, affirmed by the Supreme court on April 19, 1934. Plaintiff's counsel in the present case presented a motion in limine to question prospective jurors as to their financial interest, if any, in the Employers Indemnity Insurance Company; this motion was supported by an affidavit by an attorney associated with plaintiff's attorney that he was informed and believed that defendant carried liability insurance in the Ideal Company and that the attorneys for that company were acting as attorneys for defendant in the trial of the case, and that the insurance company will pay any judgment that may be entered against defendant; that the interests of plaintiff would be prejudiced if her counsel was not allowed to inquire of prospective jurors as to their financial interest, if any, in the insurance

company.

The form of the question put to the veniremen was, "Do any of you * gentlemen own any stocks or securities or have any financial interest in any company which defends or handles defenses of cases of this kind?" Defendant's counsel objected and moved to withdraw a juror, which was overruled. In the Smithers case, in the Appellate court and in the Supreme court opinions the subject of inquiring of prospective jurors on the voir dire as to any interest they might have in any insurance company handling the defense in the case was discussed at considerable length. The conclusion reached was that where the questions to the jurors are propounded in good faith with the object of eliminating interested parties from the jury, such questions are proper and to permit them is not reversible error. Following the opinions in that case, we hold there was no reversible error committed in this respect in the instant case.

Counsel for defendant maintain that defendant did not operate or control the toboggan slide at the time of the occurrence in issue. Defendant erected the slide on its grounds and admits ownership but says that its operation and control was by Benjamin F. Merriman, not the agent of defendant.

Merriman was employed by defendant in the summer as assistant manager and from November until spring as a day watchman, receiving a salary; the toboggan slide when first erected was operated by defendant for a time but in December, 1934, it made an arrangement wit Merriman whereby he might serve luncheons and drinks in the clubhous during the winter and operate certain winter sports, including the toboggan slide and toboggans in question, all for his own profit; this was the arrangement for the winter of 1935-36. A charge of 25¢ was made to each person using the toboggan slide and this went to Mr. Merriman; the club employed no one to operate the toboggan but Merriman employed and paid the necessary help. One of his employee

company.

The form of the question put to the witnesses was, "Do any of you - particularly any stock or securities or have any financial interest in any company which takes or handles patronage of cases of this kind?" Defendant's counsel objected and moved to strike a juror, but he was overruled. In the Guilliere case, in the appellate court and in the Supreme court opinions the subject of inquiring of prospective jurors on the voir dire as to any interest they might have in any insurance company handling the defense in the case was discussed at considerable length. The conclusion reached was that some the questions to the jurors are proper in good faith with the object of eliminating interested parties from the jury, such questions are proper and to permit them is not reversible error. Following the opinions in that case, we hold there was no reversible error committed in this respect in the instant case.

Counsel for defendant maintain that defendant did not operate or control the toboggan slide at the time of the occurrence in issue. Defendant owned the slide on its grounds and admits owner-ship but says that its operation and control was by Benjamin G. Bertram, not the agent of defendant.

Bertram was employed by defendant in the summer as assistant manager and from November until spring as a day watchman, receiving a salary; the toboggan slide when first erected was operated by defendant for a time but in December, 1924, it made an arrangement with Bertram whereby he might have invitations and drinks in the clubhouse during the winter and operate certain winter sports, including the toboggan slide and toboggans in question, all for his own profit; this was the arrangement for the winter of 1925-26. A change of 25 was made to each person using the toboggan slide and this went to Mr. Bertram; he also employed no one to operate the toboggan but Bertram employed and paid the necessary help. One of his employes

was Marion Andrzejewski, who was in charge of the slide at the time of the occurrence in question.

"Whether the relationship is one of employee or independent contractor is not to be settled by general rule of law but by the facts of each particular case." East Mfg. Co. v. Creamery Co., 307 Ill. 238, 241. The right to control the manner of doing the work is the principal consideration which determines this relationship. Decatur Ry. Co. v. Industrial Board, 276 Ill. 472, 474.

To maintain the attractiveness of the club winter sports were provided by defendant, including the toboggan slide in question. Merriman, who operated it, lived at the club during the entire year; Andrzejewski, his helper, was furnished lodging by defendant.

Obviously the toboggan slide was operated for the benefit of defendant. It furnished recreation to members in the winter and would be an attraction to prospective members. That Merriman was allowed to retain the 25¢ charged for riding on the slide is not of controlling importance. It has been held that caddies of a golf club were servants of the club although they were paid directly by the players requiring their services. Indian Hill Club v. Industrial Com., 309 Ill. 271. Although Merriman or his helper operated the slide in the winter the club retained control over it. A number of magazines issued by defendant were introduced in evidence which contain invitations to members to use the toboggan slide. One of these contains the statement that "the club will not allow it to be used unless an attendant is on hand." The club, through its magazine, held out to its members that it was furnishing the toboggan slide for their use and in picturesque language they were invited "to set the tobbers to scooting down the runway on their sleds." Similar statements appear in every magazine, presenting the attractiveness of the toboggan slide and urging the members to use it.

was Darlen Jorgelewski, who was in charge of the slide at the time of the conference in question.

"Whether the relationship is one of employer or independent contractor is not to be settled by general rule of law but by the facts of each particular case." Hunt Club, Co. v. Industrial Co., 207 Ill. 339, 341. The right to control the manner of doing the work is the principal consideration which determines this relationship. Keister Sy. Co. v. Industrial Board, 278 Ill. 472, 474.

To conclude the circumstances of the club whether events were provided by members, including the toboggan slide in question Darlen, who operated it, lived at the club during the entire year; Jorgelewski, who helper, was furnished lodging by members.

Obviously the toboggan slide was provided for the benefit of members. It furnished recreation to members in the winter and would be an attraction to prospective members. That Darlenen was allowed to retain the 75% charged for riding on the slide is not of controlling importance. It has been held that members of a golf club were servants of the club although they were paid directly by the players requiring their services. Indian Hill Club v. Industrial Com., 309 Ill. 271. Although Darlenen or his helper operated the slide in the winter the club retained control over it. A number of resolutions issued by directors were introduced in evidence which permitted invitations to members to use the toboggan slide. One of these contains the statement that "the club will not allow it to be used unless an attendant is on hand." The club, therefore, its officers, held out to its members that it was furnishing the toboggan slide for their use and in picturesque language they were invited "to get the lubbers to scooting down the runway on their sleds." Similar statements appear in every magazine, presenting the attractiveness of the toboggan slide and urging the members to use it.

It is admitted that defendant had constructed and owned the slide and the jury could properly find that it was operated for its benefit. The facts are similar to those involved in Stickel v. Riverview Park Co., 250 Ill. 452, where the defendant, owning an amusement park, permitted a concessionaire to operate an attraction in which a patron was injured; it was contended that the concession was not operated by the defendant but by the concessionaire, an independent contractor; the court held that where an attraction is of a character which would probably cause injury unless due precautions were taken to guard against it, the defendant is liable for injuries caused by it to its patrons. Other cases are Dietze v. Riverview Park Co., 181 Ill. App. 357; Babicz v. Riverview Park Co., 256 Ill., 24, 33, and many other cases.

Mrs. Carver, the member who invited plaintiff, read the magazines and understood and believed from them that defendant was operating the slide. Apparently defendant never at any time, by signs on the premises or by written or verbal communications, advised its members that it did not operate it. It appeared in the magazines that Merriman was operating the lunch room, "exclusive of club jurisdiction," but there is no suggestion that the slide was not under the control of the club. In the case of Cornwell v. Leiter Bldg. Store, Inc., 259 Ill. App. 460, we held that the defendant, owner of the store, holding out to the public that it operated a beauty parlor, was liable to a patron who suffers injury because of the negligence of an employee of another company operating the beauty parlor. Other considerations might be suggested justifying the conclusion that defendant operated and maintained the slide.

It is earnestly argued that the proof failed to support the allegation of the complaint that the surface of the slide was so rough, broken and defective as to throw plaintiff violently in the

It is admitted that defendant has constructed and owned the slide and the jury could properly find that it was operated for its benefit. The facts are similar to those involved in Gilbert v. Riverview Park Co., 250 Ill. 452, where the defendant, during an amusement park, provided a concessionaire to operate an attraction in which a patron was injured; it was contended that the concession was not operated by the defendant but by the concessionaire, an independent contractor; the court held that where an attraction is of a character which would probably cause injury unless due precautions were taken to guard against it, the defendant is liable for injuries caused by it to its patrons. Other cases are Gilbert v. Riverview Park Co., 248 Ill. 400. 521; Ogden v. Riverview Park Co., 252 Ill., 84, 93, and many other cases.

Mrs. Graves, the member who invited plaintiff, read the pamphlets and understood and believed from them that defendant was operating the slide. Apparently defendant never at any time, by signs on the premises or by written or verbal communications, advised its members that it did not operate it. It appeared in the testimony that Ferriman was operating the lunch room, "exclusive of club furnishing," but there is no suggestion that the slide was not under the control of the club. In the case of Gerrard v. Lister Club, Stone, Inc., 278 Ill. App. 426, we held that the defendant, owner of the stone, holding out to the public that it operated a nearby pavilion, was liable to a person who suffers injury because of the negligence of an employee of another company operating the beauty parlor. Other considerations also be supported justifying the conclusion that defendant operates and maintains the slide.

It is earnestly argued that the proof failed to support the allegation of the complaint that the surface of the slide was so rough, broken and defective as to throw plaintiff violently in the

air. A witness testified that after he had gone down the slide he looked and saw that where the slide leveled out there was a rise in the ground, "like it came down and up again," - a slight bump or depression on the snow on the slide near the bottom of the incline; that the snow was hollowed out at this place. Other witnesses examined the slide after the accident and testified to seeing the bump. There was evidence that during the afternoon perhaps fifty people used the slide. A number of them testified that they did not notice anything unusual at the place where the accident occurred. On the other hand, other witnesses testified they were injured as they rode over the bump in question. Mr. Bassett, who was directly in front of plaintiff on the sled, testified that when they hit the bump toward the bottom of the slide the impact threw plaintiff and himself off balance and they came down hard on their spines; that he himself was injured so that he was home in bed for two weeks. A Mr. McGuire, who had been a football player and was apparently a strong, vigorous man, testified that when he went down the slide he received a severe jolt at the bottom, feeling a severe strain, and that when he got to the end of the slide he had difficulty in arising.

There was evidence that immediately after plaintiff was injured the attendant packed snow over the place of the bump and sprinkled water over it so as to smooth it out. The evidence tends to show that most of the witnesses who testified that they used the slide without noticing anything unusual, used it some time before plaintiff used it or after it had been smoothed.

Defendant's counsel argue that plaintiff received her injuries because of her failure to place herself properly upon the sled, and especially because she did not hold onto the ropes at the sides. This was a question of fact to be determined by the jury, which apparently did not agree with defendant's theory as to how

air. A witness testified that at 12 and some long the slide be looked and saw that where the slide levelled out there was a rise in the ground, 'like it was lying out by again,' - a flight into or impression on the snow at the slide-meet the bottom of the slide; that the snow was unbroken yet at this place. Other witnesses examined the slide after the accident and testified to seeing the bump. There was evidence that during the afternoon perhaps fifty people used the slide. A number of them testified that they did not notice any ice except at the place where the accident occurred. On the other hand, other witnesses testified they were injured as they rode over the bump in question. Mr. Bennett, too was directly in ?? or of plaintiff on the sled, testified that when they hit the bump toward the bottom of the slide the impact threw plaintiff and himself off balance and they came down hard on their spines; that he cleared the injured so that he was sore in bed for the week. A Mr. Coulter, who had been a fireman sleeper and was accordingly a strong, vigorous man, testified that when he went down the slide he received a severe jolt at the bottom, feeling a severe strain, and that when he got to the end of the slide he had difficulty in arising.

There was evidence that immediately after plaintiff was injured the attendant pulled snow over the place of the bump and sprinkled water over it so as to conceal it. The evidence tends to show that most of the witnesses who testified that they used the slide without noticing anything unusual, when it was like saying that it was or after it had been smoothed.

Defendant's contract stipulate that plaintiff remained for injuries because of her failure to give overall protection upon the sled, and especially because she did not hold onto the ropes at the sides. This was a question of fact to be determined by the jury, which accordingly did not agree with defendant's theory as to her

the accident happened. It would seem to be self-evident that a toboggan slide must be smooth, and the presence of such a bump as the evidence shows is unusual and not to be expected. There is, of necessity, danger in riding on a toboggan, which emphasizes the duty of using greater care in its maintenance in order that risks may be minimized. Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310, 316. While one who patronizes an amusement device assumes the risk which naturally arises from its proper use, as in Murphy v. White City Amusement Co., 242 Ill. App. 56, (a shoot the chutes case) yet the operator of the device is required to use care commensurate with the circumstances to maintain every contrivance used in its operation in a reasonably safe condition, and for any failure in this respect he is liable in damages to an injured party.

It is not important that there is no evidence that defendant had notice of the bump in question. It has been held that where a patron is invited to use a device it is the duty of the invitor to maintain the device in a reasonable safe condition. In O'Rourke v. Marshall Field & Co., 307 Ill. 197, 199, a child fell from a hobby horse provided by defendant, due to a defective handhold; defendant contended it had no notice of the defect; it was held that this was immaterial; that it was defendant's duty to maintain reasonably safe devices.

It is said that it was reversible error to admit five copies of the magazine issued by defendant. The particular point seems to be that the magazines went in as a whole and not the particular articles inviting members to use the toboggan slide. The magazines contain matter which would indicate that defendant was a wealthy club, composed of wealthy people who had little to do except to enjoy themselves in a lavish and luxurious way. If a proper objection had been made, all this extraneous matter should

the accident occurred. It would seem to be self-evident that a tobogganist might be unaware, in the absence of such a sign as the evidence shows is usual, and not to be expected, that there is, a necessity, danger in sliding on a toboggan, which emphasizes the duty of using greater care in the maintenance in order that risks may be minimized. Everett v. Lake Shipping Assoc. Co., 174 N. Y. 10, 16. This is why the judicious of management devise measures the risk and materially relieve from the proper use, as in Murphy v. Coney Island Jockey Co., 142 App. Div. 89, (a most the unique case) yet the operator of the device is required to use care commensurate with the circumstances to minimize every contingency used in its operation in a reasonably safe condition, and for any failure in this respect he is liable in damages to an injured party.

It is not important that there is no evidence that defendant had notice of the duty in question. It has been held that where a person is invited to use a device it is the duty of the invitee to ascertain the device is in a reasonably safe condition. In O'Donnell v. Everett Kind & Co., 207 Ill. 327, 199, a child fell from a toboggan provided by defendant, due to a defective condition; defendant contended it had no notice of the defect; it was held that this was immaterial; that it was defendant's duty to maintain reasonably safe devices.

It is said that it was reversible error to admit live copies of the toboggan issued by defendant. The particular point seems to be that the toboggans were in no evidence and not the particular articles involving members to use and toboggan slide. The measure contain matter which would indicate that defendant was a worldly club, concerned or worldly people who had little to do except to enjoy themselves in a lavish and luxurious way. It is proper admission and been made, as all this motion-to-make matter should

have been excluded. The record shows, however, that only a general objection was made. The magazines were objected to as incompetent, irrelevant and immaterial and not the best evidence. It has been held in The People v. Eopp, 285 Ill. 396, 408, that where an objection to a writing is general, without specifically pointing out objectionable or irrelevant portions, the objection is properly overruled. And in Illinois Central R. R. Co. v. Wade, 206 Ill. 523, 533, it was held that only when writings are inadmissible for any purpose will a general objection suffice, and that courts of review will consider only such ground for objection to the admissibility of evidence as was urged in the trial court, and that the objectionable parts of the writings should have been pointed out and their exclusion asked.

Defendant says that plaintiff's attorney read to the jury portions from magazines which had been excluded. The record at this point is somewhat confusing. When plaintiff first offered two of these magazines the court sustained an objection; subsequently plaintiff's counsel stated that he desired to offer these and an additional one, to which the court said, "I will admit that." Apparently it was understood that the court was admitting all three magazines then offered. Excluded evidence may be later reoffered and admitted. International Text Book Co. v. Mackhorn, 158 Ill. App. 543, 546-7.

The court properly admitted evidence that defendant's attendant shoveled snow upon and repaired the slide at the place where the bump was said to be. Such evidence is admissible as tending to establish the condition of the slide at the time of the accident. Richert v. Village of Niles, 205 Ill. App. 283, 285; City of Chicago v. Dalle, 115 Ill. 386, 389. And in 45 C. J. 1234, sec. 792, is a list of cases cited in support of the proposition that evidence of repairs may be admitted to show the condition at

have been excluded. The record shows, however, that only a general objection was made. The magazines were objected to as incompetent, irrelevant and immaterial and not the best evidence. It has been held in *Cox Broadcasting v. Cohn*, 420 U.S. 469, 491, that where an objection to a writing is general, without specifically pointing out objectionable or irrelevant portions, the objection is properly overruled. And in *Pittsburgh Courier Pub. Co. v. Zeder*, 208 Ill. 525, 534, it was held that only such writings are inadmissible for any purpose will a general objection suffice, and that courts of review will consider only such grounds for objection in the admissibility of evidence as were urged in the trial court, and that the objectionable parts of the writings should have been pointed out and their exclusion asked.

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The court properly admitted evidence that defendant's employee wrote down and remained the slips of the place where the boy was said to be. Such evidence is admissible as tending to establish the condition of the place at the time of the accident. *Kinnert v. Village of Niles*, 308 Ill. App. 222, 226; *City of Quincy v. Duke*, 113 Ill. 546, 548. And in *Id. v. J. 1974*, 480, 492, in a list of cases cited in support of the proposition that evidence of regulations may be admitted to show the condition at

the time of the injury and its cause. Various other rulings of the trial court on the admissibility of evidence are mentioned but none of them is of sufficient importance to justify extended comment.

It is said the trial court permitted counsel for plaintiff to make an improper and inflammable argument to the jury. No specific objections were made at the time. It was not error to refer in argument to a picture of four girls on a toboggan in one of the magazines in evidence. No objection was made to this and both counsel discussed it. We find no merit in defendant's criticism of the argument before the jury.

Neither is there any merit in the criticism of the instructions given to the jury at the request of plaintiff. Instruction 13 merely submitted to the jury the question of fact of the operation and control of the slide. There was abundant evidence to be submitted to the jury on this point. Moreover, at defendant's request instructions were given also telling the jury that the question of operation and control was one of fact. Plaintiff's instruction 18 is not objectionable. It presented the question, to be determined by the jury, whether defendant held out to its members and their guests that it operated the slide.

The judgment is not excessive. Plaintiff at the time of the accident was said to be thirty years of age, healthy and athletic, doing her own housework, with the care of her children. In the accident in question she sustained a compression fracture of the twelfth thoracic vertebra; this is a fracture caused by force exerted at the end of the spinal column; also, what is called the intervertebral disc, between the vertebrae, was injured; she was taken to a hospital and weights were placed about her body to take the pressure off the injured vertebrae; she was placed in a cast which was left on for four months; this was replaced by what is

called a Taylor brace, which is intended to keep the spine in a rigid condition and to exaggerate its curvature; she wore this brace at the time of the trial, over a year after the accident, and doctors testified that this condition was permanent; she also suffers constant pain in her back, with nausea, and at intervals numbness throughout her hips and legs; doctors testified that these conditions could have resulted from the spinal injury which she suffered and that her condition required further medical care. We see no reason to hold that the verdict is excessive.

The jury found that plaintiff proved all the necessary elements entitling her to recover damages, and we cannot say its verdict is manifestly against the weight of the evidence. There were no reversible errors committed upon the trial, and as the judgment is not excessive it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39455

EDWARD P. HOFF et al.,
Appellants,

vs.

L. H. HEYMANN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

295 I.A. 622

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

January 12, 1937, plaintiffs filed their complaint in chancery against L. H. Heymann, Nelson Morris, Max Blum and Charles S. Brill, as members of a committee under an agreement dated September 30, 1931, for the protection of certain bondholders, and the Liberty National Bank of Chicago. An amendment to the complaint was filed January 15, 1937. January 20th the defendants made a motion under section 45 of the Civil Practice Act to strike the complaint and dismiss the suit for reasons specifically set up in the motion. The motion was granted, the complaint stricken and the cause dismissed; plaintiffs appeal.

This is not the first litigation in which the rights of this committee have been challenged, as will appear from a perusal of In re Petition of William L. O'Connell, 282 Ill. App. 146; People v. West Side Trust & Savings Bank, 280 Ill. App. 308, and the same cause in the Supreme court in 362 Ill. 607. Also in case General Number 39892, B. J. Dolan, as Successor Trustee, etc. v. Ruben Morensky et al., opinion filed April 11, 1938. In the last named case this court decided adversely to the contention of plaintiffs' many points urged on this appeal.

The averments of the complaint are that the West Side Trust & Savings Bank was an Illinois banking institution which was taken over by the Auditor of Public Accounts on August 19, 1933; it was found to be insolvent and William L. O'Connell was appointed

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APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

295 I.A. 623

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January 12, 1937, plaintiffs filed their complaint in chancery against I. H. Heymann, Nelson Morris, Max Blum and Charles S. Brill, as members of a committee under an agreement dated September 30, 1931, for the protection of certain bondholders, and the Liberty National Bank of Chicago. An amendment to the complaint was filed January 15, 1937. January 20th the defendants made a motion under section 45 of the Civil Practice Act to strike the complaint and dismiss the suit for reasons specifically set up in the motion. The motion was granted, the complaint stricken and the cause dismissed; plaintiffs appeal.

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The averments of the complaint are that the West Side Trust & Savings Bank was an Illinois banking institution which was taken over by the Auditor of Public Accounts on August 19, 1933; it was found to be insolvent and William I. O'Connell was appointed

receiver; upon his death Charles H. Albers was named as his successor and is now acting as such; that the bank had been engaged in making loans by means of bond issues secured by different parcels of real estate of which it was named trustee to secure payment of the bonds; that it acted as the paying and collecting agent. These properties are seven in number and the premises are particularly described.

The complaint sets up certain of the provisions of the trust deeds conveying the property, these trust deeds being in the usual form; avers that numerous defaults occurred in the payment of interest and principal; that to maintain its reputation and enable it to keep the confidence of the bondholders, the bank and its officers and directors concealed the defaults and cashed the bonds and coupons when they were presented for payment at maturity, thereby leading the investors to believe that everything was well, until about September 30, 1931, when it organized the protective committee under the deposit agreement dated September 30, 1931, a true copy of which plaintiffs say they are ready to produce in court. Simultaneously with the formation of the committee the bank and its officers and directors solicited investors to deposit their bonds with the bank as a depositary, addressing to the bondholders communications, which are set up in the bill, in substance that to protect the bondholders the trustee had taken possession of the property and would, if possible, purchase titles for a nominal consideration; that otherwise the foreclosure proceedings would be necessary so that the properties might be acquired and ultimately reorganized; that there would be no charge to the bondholders for the services of the committee, the fees of its attorney or the services of the West Side Trust & Savings Bank of Chicago as Depositary; that relying upon these representations plaintiffs and others deposited some of

receiver; upon his death Carlson, Albers was named as his successor and is now acting as such; that the bank had been engaged in making loans by means of bond issues secured by different parcels of real estate of which it was named trustee to secure payment of the bonds; that it acted as the paying and collecting agent. These properties are seven in number and the premises are particularly described.

The complaint sets up certain of the provisions of the trust deds conveying the property, these trust deds being in the usual form; avers that numerous defaults occurred in the payment of interest and principal; that to maintain its reputation and enable it to keep the confidence of the bondholders, the bank and its officers and directors concerning the defaults and cashed the bonds and coupons when they were presented for payment at maturity, thereby leading the investors to believe that everything was well, until about September 30, 1931, when it organized the protective committee under the deposit agreement dated September 30, 1931, a true copy of which plaintiffs say they are ready to produce in court. Simultaneously with the formation of the committee the bank and its officers and directors solicited investors to deposit their bonds with the bank as a depositary, addressing to the bondholders communications, which are set up in the bill, in substance that to protect the bondholders the trustee had taken possession of the property and would, if possible, purchase title for a nominal consideration; that otherwise the foreclosure proceedings would be necessary so that the properties might be acquired and with safety reorganized; that there would be no charge to the bondholders for the services of the committee, the fees of its attorney or the services of the West Side Trust & Savings Bank of Chicago as depositary; that relying upon these representations plaintiffs and others deposited some of

their bonds and certificates of deposit were issued to them. The names of plaintiffs, the names of the properties and the amount of their respective investments are stated, showing plaintiffs hold a very small amount, comparatively, of the total bonds issued and outstanding. The bill says that plaintiffs from the date of deposit until now have received no communication informing them of progress made; that when the bank closed the committee abandoned its office and plaintiffs could communicate with the committee only by mail; that the depositors have not received anything on account of interest or principal, nor received any information as to any plan of reorganization, but "were entirely kept in the dark as to the activities of the Committee and its acts and doings." The complaint then sets up the result of an investigation of the records in the office of the Recorder of Deeds as to the progress of the various foreclosures begun, etc. The complaint says plaintiffs have now discovered that the parcels of real estate were acquired by the committee with funds advanced by the bank upon notes given by the committee in its representative capacity, "and that the members of the Bondholders' Committee are the secret beneficial owners of the properties which are of record in the name of the Liberty National Bank, as Trustee, and that funds derived from the income of the property were used to reimburse the Committee and the 'Bank' for part of the moneys advanced." The complaint states that no steps to reorganize have been taken as to these properties which remain of record in the name of the Liberty National Bank, and the bondholders have not received anything on account of their investments. Plaintiffs also say they have discovered -

"(a) That the persons who held themselves out as the protectors of the bondholders and who solicited them to deposit the bonds on the representations that the Committee was formed 'to protect the interest of the bondholders' concealed the real purpose of its formation. While it was ostensibly held out that the Committee was organized for the sole protection of the investors, it was, in fact, organized for the protection of the 'Bank' wherein said L. H.

their bonds and certificates of deposit were issued to them. The names of plaintiffs, the names of the properties and the amount of their respective investments are stated, showing plaintiffs hold a very small amount, comparatively, of the total bonds issued and outstanding. The bill says that plaintiffs from the date of deposit until now have received no communication informing them of progress made; that when the bank closed the committee abandoned its office and plaintiffs could communicate with the committee only by mail; that the depositors have not received anything on account of interest or principal, nor received any information as to any plan of reorganization, but "were entirely kept in the dark as to the activities of the Committee and its acts and doings."

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Heymann, and Nelson Morris were its principal stockholders, officers and directors, and financially interested in saving its investments in the defaulted bonds and coupons.

(b) It was known to the organizers of the Committee and to the 'Bank' and its officers and directors that large blocks of defaulted bonds and coupons were owned by the 'Bank' which were by law subordinated because of the advancement of the money on the defaulted bonds and coupons without notice, and that because of the concealment of the material facts, it was their legal duty to subordinate same.

(c) It was also known to them that in many instances the 'Bank' wrongfully applied the income of the properties to reimburse itself for funds advanced on defaulted bonds and coupons.

(d) Since the creation of the committee many foreclosures were instituted, which resulted in placing on a parity subordinated bonds of the 'Bank' with the other bonds deposited, without notice or knowledge to the depositors. In other instances foreclosure sales were held where the property was sold yielding less than ten cents on the dollar, and both the non-depositors and the depositors were defrauded out of their investments, and in no case did the Committee notify the bondholders in due time to protect their interests."

"That by reason of the malfeasance and misfeasance of the committee with reference to its trust duties and obligations the members of the committee are disqualified and liable for their acts and duties."

The complaint also charges the Deposit Agreement was wholly void (because of various matters hitherto considered in the Morensky case) and charges that the appointment of B. J. Dolan as successor trustee was illegal and void because the deposit agreement was void. As a matter of fact, it was conceded in the Morensky case (in which counsel for plaintiff there represent plaintiffs here) that Dolan is dead and that E. R. Burnett has been named as successor trustee. The complaint asks that the title acquired by the Liberty National Bank be declared to be in trust for the benefit of the boldholders; that receivers be appointed to take charge of the trust estate and of all property in the possession of the committee; that this receiver manage and operate the premises, etc.; that the deposit agreement be declared void, and, in the alternative, if it is declared valid, the members of the committee be disqualified and removed and competent persons appointed by the court until such time as the depositors

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The complaint also charges the Deposit agreement was wholly void (because of various matters hitherto considered in the Boremsky case) and charges that the appointment of I. J. Dolan as successor trustee was illegal and void because the deposit agreement was void. As a matter of fact, it was conceded in the Boremsky case (in which counsel for plaintiff there represent plaintiffs here) that Dolan is dead and that E. R. Barrett has been named as successor trustee. The complaint asks that the title acquired by the Liberty National Bank be declared to be in trust for the benefit of the bondholders; that receivers be appointed to take charge of the trust estate and of all property in the possession of the committee; that this receiver manage and operate the premises, etc.; that the deposit agreement be declared void, and, in the alternative, if it is declared valid, the members of the committee be disqualified and removed and competent persons appointed by the court until such time as the depositors

themselves select others. Plaintiffs file the complaint in behalf of themselves and all other bondholders, and ask that the court may provide for the payment of expenses incurred by plaintiffs for the protection of the entire trust estate.

As already stated, many of the questions raised upon this appeal have already been decided contrary to the contentions of the plaintiff in the Morensky case. The motion to dismiss admits to be true all the facts which are well pleaded, but in passing on the motion the pleadings are to be construed most strongly against the pleader. The complaint attempts to charge fraud but only by way of vague allegation. If we eliminate the conclusions of the pleader there is practically nothing left to the complaint. We have read the complaint not only as it appears in the abstract but also in the record. Stripped of bare conclusions it fails to give any information which would justify a decree as prayed. In an indefinite way this bill charges dereliction on the part of the West Side Trust and Savings Bank, but that Bank is not a party to this proceeding. Vague and general charges are made against the committee as a whole without specifications of personal wrongdoing. The complaint can serve no useful purpose. Its effect is to cloud the title of these various tracts of land described in the complaint, obstruct the pending foreclosure proceedings, and delay rather than expedite the proceedings by which the bondholders may ultimately realize some part of the amount due on their bonds. Plaintiffs say the complaint is "full of equity." On the contrary, we find there is no equity in it. The decree is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

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AFFIRMED.

O'Connor, P. J., and Scanlan, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On FEB 15 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9236 Agenda No. 22

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A. D. 1937.

45A

Frank Raduenz,

Appellee

vs.

J. F. Kelley, doing business under the name and style of J. F. Kelley Motor Sales,

Appellant.

Appeal from Circuit Court Kane County.

HUFFMAN - J.

This was an action by appellee against appellant and one Hillis Barber, his alleged agent and servant, for personal injuries arising from a collision of an automobile in which appellee was riding, with one driven by the said Barber. Appellant filed pleas denying agency, and, that Barber was not acting within the scope of his employment at the time of the accident. The jury returned a verdict for $3000 in favor of appellee, and against both defendants. Judgment was entered thereon. The defendant Kelley prosecutes this appeal.

The only contention raised by appellant is the sufficiency of the evidence tending to prove the relationship of master and servant, or principal and agent, as between him and the defendant Barber. Appellant had been engaged in the automobile business in the city of Aurora for fourteen years prior to the time of trial. He employed various salesmen. At the time of the accident, the co-defendant Barber was in his employ as a salesman, as well as some five or six other salesmen. The evidence with respect to the question involved in this appeal is brief and not in dispute. It consists of the testimony of Barber, who was first called by the plaintiff under Sec. 60 of the Practice Act, and later of his testimony and that of Mr. Kelley, as defendants. It appears that Barber was

IN THE CRIMINAL COURT OF APPEALS;

BROWN, DISTRICT

OPINION FILED, J. 1. 1920.

Error Hardeman;

Appellee

vs.

J. E. Kelley, doing business under the name and style of J. E. Kelley Motor Sales,

Appellant.

HOFFMAN - J.

This was an action by appellee against appellant and one Willis Barber, his alleged agent and servant, for personal injuries arising from a collision of an automobile in which appellee was riding, with one driven by the said Barber. Appellant filed plea denying agency, and, that Barber was not acting within the scope of his employment at the time of the accident. The jury returned a verdict for $3000 in favor of appellee, and against both defendants. Judgment was entered thereon. The defendant Kelley prosecutes this appeal.

The only contention raised by appellant is x the sufficiency of the evidence tending to prove the relationship of master and servant, or principal and agent, as between him and the defendant Barber. Appellant had been engaged in the automobile business in the city of Aurora for fourteen years prior to the time of trial. He employed various salesmen. At the time of the accident, the co-defendant Barber was in his employ as a salesman, as well as some five or six other salesmen. The evidence with respect to the question involved in this appeal is brief and not in dispute. It consists of the testimony of Barber, who was first called by the plaintiff under Sec. 60 of the Practice Act, and later at his testimony and that of Mr. Kelley, as defendants. It appears that Barber was

giving a considerable portion of his time and attention to the sale of used cars, and that in the furtherance of this work he made arrangements with parties operating a filling station at Geneva, Illinois, to park used cars on a lot adjacent to such filling station. Geneva is ten miles from Aurora. During the month of May, 1936, Barber devoted most of his time to the sale of cars in and about Geneva. He used one of appellant's cars in going to and from his home in Aurora to Geneva. This work was carried on under the direction of appellant. The price of the used cars was fixed by appellant, as well as the method of payment therefor, and also any allowance for another car that might be taken in on a sale. The accident in question happened on the morning of May 10, 1936, which was on Sunday. Barber was in the act of taking a car from his home to appellant's garage for the purpose of exchanging it for another one which he intended to take to Geneva, in connection with the work he was doing there.

It is urged by appellant that he had given Barber no instructions for this particular Sunday. However, the evidence of appellant as well as that of Barber, discloses that it was not the custom of appellant to give Barber any instructions as salesman, but left his activities along this line up to him. It further shows that appellant knew it was the habit and custom of Barber and his other salesmen to make demonstrations of cars on Sunday the same as on any other day. The sole purpose of the employment of Barber was for the seeking out of prospects, demonstrating automobiles to such prospects, and making sales thereof. It appears, as above stated, that Barber was devoting his attention to the sale of used cars in and about Geneva, as appellant's salesman and representative. Such work of necessity involved the act of taking appellant's cars from Aurora to Geneva where they were to be stored on the lot in question and where appellant knew Barber was making demonstrations and endeavoring to make sale and disposition thereof.

giving a considerable portion of his time and attention to the sale of used cars, and that in the furtherance of this work he made arrangements with parties operating a filling station at Geneva, Illinois, to park used cars on a lot adjacent to such filling station. Geneva is ten miles from Aurora. During the month of May, 1936, Barber devoted most of his time to the sale of cars in and about Geneva. He used one of appellant's cars in going to and from his home in Aurora to Geneva. This work was carried on under the direction of appellant. The price of the used cars was fixed by appellant, as well as the method of payment therefor, and also any allowance for another car that might be taken in on a sale. The accident in question happened on the morning of May 10, 1936, which was on Sunday. Barber was in the act of taking a car from his home to appellant's garage for the purpose of exchanging it for another one which he intended to take to Geneva, in connection with the work he was doing there.

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The evidence discloses that Barber had no definite hours of work, and in conducting the sale of used cars for appellant in Geneva, he devoted his time thereto on Sunday as well as on any other day; that he took such cars from appellant's place of business in Aurora to the lot in Geneva, as he saw fit, and at such times as he chose; and that appellant knew this. Barber states that his purpose in taking the car in question to the garage to exchange it for another one, was in order that he might make a demonstration of the other car at Geneva. It appears from the evidence that his acts on the morning in question were no different from those which were usual and customary to his employment, and that appellant was conversant therewith.

Under the above circumstances, the verdict of the jury finding that Barber was acting within the scope of his employment at the time of the accident, was not contrary to the weight of the evidence. The judgment is therefore affirmed.

Judgment affirmed.

The evidence discloses that Barber had no definite hours of work, and in conducting the sale of used cars for appellant in Geneva, he devoted his time thereto on Sunday as well as on any other day; that he took such cars from appellant's place of business in Aurora to the lot in Geneva, as he saw fit, and at such times as he chose; and that appellant knew this. Barber states that his purpose in taking the car in question to the garage to exchange it for another one, was in order that he might make a demonstration of the other car at Geneva. It appears from the evidence that his acts on the morning in question were no different from those which were usual and customary to his employment, and that appellant was conversant therewith.

Under the above circumstances, the verdict of the jury finding that Barber was acting within the scope of his employment at the time of the accident, was not contrary to the weight of the evidence. The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9271

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 622

BE IT REMEMBERED, that afterwards, to-wit: On MAR 31 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9279 Agenda No. 11

In the Appellate Court of Illinois

Second District

February Term, A.D. 1938

City of Sterling,

Appellee,

vs.

Frank Berry,

Appellant,

Appeal from the Circuit Court of Whiteside County

DOVE, P. J.

This suit originated before a Justice of the Peace on September 11, 1936 and was brought by the City of Sterling against Frank Berry to recover a penalty under a city ordinance for a failure upon Berry's part to register his dog and pay a license or tax therefor. The case was thereafter appealed to the city court of Sterling, where a jury was waived and the cause submitted to the court for determination, resulting in a judgment in favor of the city and against the defendant for $3.00 and costs. From that judgment Berry appealed to the Supreme Court upon the ground that the validity of a municipal ordinance was involved. The Supreme Court found, upon an examination of the record, that the constitutional questions raised have been disposed of and that the other questions in the case present no ground of jurisdiction for that court and ordered the cause transferred to this court.

It appears from the record that at least since 1927 there was in effect in the City of Sterling an ordinance prohibiting any person to keep within the corporate limits of the city any dog unless the dog is registered and the registration tax paid as provided by the ordinance. Section two of this ordinance made it the duty of all persons owning dogs or keeping dogs in the city to cause such dogs to be registered by name and description in the office of the Chief of Police of the city and to pay, prior to the 15th of June

Gen. No. 9279 Agenda No. 11

In the Appellate Court of Illinois,

Second District

February Term, A.D. 1936

City of Sterling,

Appellee,

vs.

Frank Berry,

Appellant,

Appeal from the Circuit Court

of Whiteside County

DOVE, P. J.

This suit originated before a Justice of the Peace on September 11, 1936 and was brought by the city of Sterling against Frank Berry to recover a penalty under a city ordinance for a failure upon Berry's part to register his dog and pay a license or tax therefor. The case was thereafter appealed to the city court of Sterling, where a jury was waived and the cause submitted to the court for determination, resulting in a judgment in favor of the city and against the defendant for $5.00 and costs. From that judgment Berry appealed to the Supreme Court upon the ground that the validity of a municipal ordinance was involved. The Supreme Court found, upon an examination of the record, that the constitutional questions raised have been disposed of and that the other questions in the case present no ground of jurisdiction for that court and ordered the cause transferred to this court.

It appears from the record that at least since 1927 there was in effect in the City of Sterling an ordinance prohibiting any person to keep within the corporate limits of the city any dog unless the dog is registered and the registration tax paid as provided by the ordinance. Section two of this ordinance made it the duty of all persons owning dogs or keeping dogs in the city to cause such dogs to be registered by name and description in the office of the Chief of Police of the city and to pay, prior to the 15th of June

in each municipal year a tax of $2.00 for every male dog and to obtain from said Chief of Police and attach to the dog, a metalic check which the ordinance required the Chief of Police to furnish. Section 4 of this ordinance made it the duty of the Chief of Police to pay to the City Clerk at the end of each month the dog tax which he received, Section 9 of the same ordinance provided a penalty of not less than $3.00 and not more than $50.00 for anyone who violated or failed to comply with the provisions of the ordinance. On January 23, 1933 the city passed another ordinance designated in this record as Ordinance No. 617. This ordinance specifically amended Section two of the original ordinance by reducing the tax from $2.00 as provided by the original ordinance to $1.00. It was stipulated that t e ordinance passed by the city council on January 23, 1933 has not been published as provided by the statute. The record further discloses that there was also in effect in said city and had been since 1927 another ordinance which provided that whenever an ordinance shall be repealed or modified by a subsequent ordinance, the ordinance or part of the ordinance thus repealed or modified, shall continue in force until the repealing or modifying ordinance shall take effect by due publication, or otherwise, unless therein otherwise expressly provided. It was also further stipulated that during the municipal year beginning May 1, 1936, and ending May 1, 1937, appellant resided within the city limits of the City of Sterling and kept a male dog and did not pay any registration tax for that year. Subject however, to the objection of counsel for appellee that such fact was immaterial, incompetent and not germane to any issue in this proceeding, it was stipulated that on April 8, 1936, appellant did pay to Whiteside County $1.00 tax on his dog for the calendar year 1936.

In Paxton v. Fitzsimmons, 253 Ill. 355, it was held that the statute, (Sec. 65.79, Chap. 24, Ill. Rev. St.) granting power to

in each municipal year a tax of $1.00 for every male dog and to obtain from said Chief of Police and attach to the dog, a metallic check which the ordinance required the Chief of Police to furnish. Section 4 of this ordinance made it the duty of the Chief of Police to pay to the City Clerk at the end of each month the dog tax which he received. Section 9 of the same ordinance provided a penalty of not less than $5.00 and not more than $50.00 for anyone who violated or failed to comply with the provisions of the ordinance. On January 23, 1933 the city passed another ordinance designated in this record as Ordinance No. 817. This ordinance specifically amended section two of the original ordinance by reducing the tax from $2.00 as provided by the original ordinance to $1.00. It was stipulated that the ordinance passed by the city council on January 23, 1933 has not been published as provided by the statute. The record further discloses that there was also in effect in said city and had been since 1927 another ordinance which provided that whenever an ordinance shall be repealed or modified by a subsequent ordinance, the ordinance or part of the ordinance thus repealed or modified, shall continue in force until the repealing or modifying ordinance shall take effect by due publication, or otherwise, unless therein otherwise expressly provided. It was also further stipulated that during the municipal year beginning May 1, 1936, and ending May 1, 1937, appellant resided within the city limits of the city of Sterling and kept a male dog and did not pay any registration tax for that year. Subject however, to the objection of counsel for appellee that such fact was immaterial, incompetent and not relevant to any issue in this proceeding, it was stipulated that on April 7, 1936, appellant did pay to Whiteside County $1.00 tax on his dog for the calendar year 1936.

In Paxton v. Kitzsimmons, 253 Ill. 355, it was held that the statute, (Sec. 65.79, Chap. 24, Ill. Rev. St.) granting power to

cities to regulate the running at large of and to impose a tax upon dogs, authorizes the city to impose, under the exercise of its police power, a license fee on dogs. Counsel for appellant insist that that decision is not a correct interpretation of the statute and is not in harmony with the constitution. Counsel further state that they are making points in their argument in this case which were not called to the attention of the Supreme Court in the Paxton case and that therefore they are entitled to a different ruling with respect to the validity of the ordinance involved in this proceeding than was made in the case of the Paxton ordinance. We have read and considered the arguments made but in our opinion the Paxton case is decisive of the questions presented by this record and the only judgment which the trial court could have rendered based upon that authority was the judgment that was rendered.

Counsel for appellant concede that all the provisions of Ordinance 617 hereinafter set out are not in effect because they amended a penal ordinance and therefore required publication but counsel insists that the repealing portion of this amending ordinance is separable from the rest of the ordinance and that this portion was not penal in character and therefor did not require publication and did go into effect and the original ordinance was by the repealing portion or Ordinance 617 fully repealed. The ordinance passed by the City Council on January 23, 1933 as abstracted is as follows:

> "That Section 2 of Chapter 9 of the Revised Ordinances of the City of Sterling, pertaining to the registration of dogs be amended to read and is hereby amended in words and figures as follows:
>
> It shall be the duty of all persons who shall own, have harbor or keep, in this city, as mentioned in Section 1 hereof, any dog, in each municipal year, and prior to the fifteenth day of June in each year to cause such dog to be registered by its name if it has any and its general description, in the office of the Chief of Police in a register to be kept by him for such purpose, and to pay to the Chief of Police the tax of one dollar for every male dog, or sterilized female dog, and three

cities to regulate the running at large of and to impose a tax upon dogs, authorizes the city to impose, under the exercise of its police power, a license fee on dogs. Counsel for appellant insist that that decision is not a correct interpretation of the statute and is not in harmony with the constitution. Counsel further state that they are making points in their argument in this case which were not called to the attention of the Supreme Court in the Exton case and that therefore they are entitled to a different ruling with respect to the validity of the ordinance involved in this proceeding than was made in the case of the Exton ordinance. We have read and considered the arguments made but in our opinion the Exton case is decisive of the questions presented by this record and the only judgment which the trial court could have rendered based upon that authority was the judgment that was rendered.

Counsel for appellant concede that all the provisions of Ordinance 617 hereinafter set out are not in effect because they amended a penal ordinance and therefore required publication but counsel insists that the repealing portion of this amending ordinance is separable from the rest of the ordinance and that this portion was not penal in character and therefor did not require publication and did go into effect and the original ordinance was by the repealing portion of Ordinance 617 fully repealed. The ordinance passed by the City Council on January 20, 1920 as amended is as follows:

> "That Section 2 of Chapter 9 of the revised Ordinances of the City of Leadville, pertaining to the registration of dogs be amended to read and is hereby amended in words and figures as follows:
>
> It shall be the duty of all persons who shall own, have, harbor or keep, in this city, as mentioned in Section 1 hereof, any dog, in each municipal year, and prior to the fifteenth day of June in each year to cause such dog to be registered by its name if it has any and its general description, in the office of the Chief of Police in a register to be kept by him for such purpose, and to pay to the Chief of Police the tax of one dollar for every male dog, or sterilized female dog, and three

dollars for every unsterilized female dog, and also obtain from said Chief of Police and attach to every dog, the metallic check hereinafter required to be furnished by him.

All ordinances or parts of ordinances in conflict herewith are hereby repealed."

What appellee sought to accomplish by this amendment was to reduce the license fee provided for in its original ordinance and the addition of the repealing clause added nothing because all prior ordinances in conflict with the new provisions would be repealed by implication. There was, however, no ordinance in conflict with its provisions unless the provisions of Ordinance 617 became effective and so long as the amending ordinance did not go into effect, there was nothing in conflict with it and therefore nothing was repealed. Ordinance 617 is not separable but must be treated as an entirety. It never became effective and the original ordinance under which this proceeding was based remained unaffected by its passage.

We have considered the other questions raised and argued by counsel for appellant attacking the validity of the original ordinance and in our opinion they are without merit. The judgment will therefore be affirmed.

Judgment Affirmed.

dollars for every unneutralized female dog, and also certain from said Chief of Police and issued to every dog, the metallic check hereinafter required to be furnished by him.

All ordinances or parts of ordinances in conflict herewith are hereby repealed."

That appellee sought to accomplish by this amendment was to reduce the license fee provided for in the original ordinance and the addition of the repealing clause added nothing because all prior ordinances in conflict with the new provisions would be repealed by implication. There was, however, no ordinance in conflict with its provisions unless the provisions of Ordinance 617 became effective and so long as the amending ordinance did not go into effect, there was nothing in conflict with it and therefore nothing was repealed. Ordinance 617 is not separable but must be treated as an entirety. It never became effective and the original ordinance under which this proceeding was based remained unaffected by its passage.

We have considered the other questions raised and argued by counsel for appellant attacking the validity of the original ordinance and in our opinion they are without merit. The judgment will therefore be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

additional opinion

9279

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 622 4A

BE IT REMEMBERED, that afterwards, to-wit: On JUN 14 1938 the additional Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9279 Agenda No. 11

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1938

46A

CITY OF STERLING,

Appellee

vs.

FRANK BERRY,

Appellant.

Appeal from the Circuit Court of Whiteside County.

UPON PETITION FOR REHEARING

It is insisted by counsel for appellant in their petition for rehearing that appellant is prosecuted for a failure to pay the tax imposed by Ordinance No. 617, that this court held Ordinance No. 617 never became effective and that a great injustice has been done appellant by subjecting him to a penalty for failure to comply with an Ordinance not in effect at the time the prosecution was instituted.

The record discloses that in compliance with a demand of the defendant a bill of particulars was filed in the City Court after the appeal had been perfected to that court. This bill pf particulars stated among other things that this action was brought by the City to recover from the defendant the penalty provided by ordinance for failure to register a dog and pay the registration tax thereon, as required by Chapter 9 of the Revised Ordinances, and Ordinance Number 617 of said City, that the penalty provided is not less than $3.00 or more than $50.00: that Ordinance No. 617 was passed January 23, 1933, and has not been published. Upon the hearing it was stipulated

Gen. No. 3272 Appeal No. 11

In the
Municipal Court of Cincinnati
Hamilton County, Ohio.

May Term, A.D. 1920

City of Cincinnati,

Appellee

vs.

Frank Smith,

Appellant.

Appeal from the Criminal
Court of Hamilton County.

THE CONSTITUTIONAL QUESTION.

It is insisted by counsel for appellant in their argument for reversing that appellant is prosecuted for a failure to pay the tax imposed by ordinance No. 817, that this court held ordinance No. 817 never became effective and that a penal injunction has been issued against by enjoining him to a penalty for failure to pay a tax which is void as unknown and in effect at the time the prosecution was instituted.

The record discloses that in complying with a decree of the Superior a bill of particulars was filed in the City Court after the appeal had been perfected to that court. This bill of particulars stated among other things that this action was brought by the City to recover from the defendant the penalty provided by ordinance for failure to register a dog and pay the registration tax thereon, as required by Chapter 9 of the Revised Ordinances, and ordinance number 817 of said city, that the penalty provided is not less than $5.00 or more than $20.00; that ordinance no. 817 was passed January 29, 1921, and has not been repealed. Upon the hearing it was stipulated

that in 1927 the City published its book of Revised Ordinances, which were published pursuant to an ordinance passed on October 10, 1927, that Chapter nine was included in that book and is an ordinance entitled "Dogs". Upon the hearing, the City offered in evidence a certified copy of that ordinance, being said Chapter Nine. Counsel for defendant objected to its admission upon the ground that Section 2 of that ordinance was repealed by ordinance Number 617. We held that Ordinance No. 617 never became effective, that the prior ordinance remained in force and from the bill of particulars it appears that defendant was prosecuted under the provisions of the ordinance which we held in effect at the time the prosecution was instituted.

REHEARING DENIED.

Since in 1927 the city published its book of revised ordinances, which were published pursuant to an ordinance passed on October 10, 1927, that chapter also was included in that book and is an ordinance entitled "Dogs". Upon the passing, the city offered in evidence a certified copy of that ordinance, which said chapter 7.1.1. Counsel for defendant objected to its admission upon the ground that section 2 of that ordinance was repealed by ordinance Number 817. He said that ordinance No. 817 never became effective, that the prior ordinance remained in force and from the bill of particulars it appears that defendant was prosecuted under the provisions of the ordinance which we held in effect at the time the possession was instituted.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the additional opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of June in the year of our Lord one thousand nine hundred and thirty-eight

Clerk of the Appellate Court

(73815—5M—3-32) 7

1237

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On MAR 31 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

General No. 9237 Agenda No. 1

In the Appellate Court of Illinois

Second District

October Term, A. D. 1937

Dixie Dairy Company,

Appellant,

vs.

Henry Schultz,

Appellee,

Appeal from the Circuit Court of Will County

WOLFE-J.

The Dixie Dairy Company, the plaintiff in this cause, is an Illinois Corporation engaged in the sale of milk etc., at Beecher, Illinois and adjacent communities. Its President and General Manager is C. B. Eskilson. The Dixie Dairy Company employed the defendant, Henry Schultz, in the year 1922, to work for them in their Beecher plaht. Henry Schultz, continued to work for the dairy company. In 1925 the business of the company expanded and Mr. Eskilson called a meeting of the employees, attended by Mr. Schultz and others, and explained to them that all employees were requested to buy stock in the company and they might pay for said stock with notes to be paid out of the wages of the employees. The plaintiff had made arrangements with the First State Bank of Beecher to handle these notes. The corporation would immediately get the purchase price of the stock and the bank would carry the notes with the stock as collateral. The notes would be gradually retired by monthly payments.

The Dixie Dairy Company agreed with the bank that it would stand back of these notes and repurchase them from the bank in the event of the employee's default. Under these arrangements Schultz and the others bought stock and Schultz gave his note for $1,000.00 in payment of the same. Later Henry Schultz sold his stock to one

General No. 9387 Agenda No. 1

In the Appellate Court of Illinois
Second District
October Term, A. D. 1937

Dixie Dairy Company,
Appellant,
vs.
Henry Schultz,
Appellee,

Appeal from the Circuit Court
of Will County

WOLFE-J.

The Dixie Dairy Company, the plaintiff in this cause, is an Illinois Corporation engaged in the sale of milk etc., at Beecher, Illinois and adjacent communities. The President and General Manager is C. E. Eskilson. The Dixie Dairy Company employed the defendant, Henry Schultz, in the year 1932, to work for them in their Beecher plant. Henry Schultz, continued to work for the dairy company. In 1932 the business of the company expanded and Mr. Eskilson called a meeting of the employees, attended by Mr. Schultz and others, and explained to them that all employees were requested to buy stock in the company and they might pay for said stock with notes to be paid out of the wages of the employees. The plaintiff had made arrangements with the First State bank of Beecher to handle these notes. The corporation would immediately get the purchase price of the stock and the bank would carry the notes with the stock as collateral. The notes would be gradually retired by monthly payments.

The Dixie Dairy Company agreed with the bank that it would stand back of these notes and repurchase them from the bank in the event of the employee's default. Under these arrangements Schultz and the others bought stock and Schultz gave his note for $1,000.00 in payment of the same. Later Henry Schultz sold his stock to one

Jergen Anderson. The Dixie Dairy Company had no notice of this sale until it was necessary to record the transfer of this stock on the books of the company. When the company found that Mr. Schultz had sold his stock, Mr. Eskilson again requested Mr. Schultz to become a stockholder, and he purchased another thousand dollars' worth of stock upon the same terms and arrangements as the first purchase. On the second purchase of stock Schultz paid approximately $100.00, and then his employment was terminated with the company and Eskilson personally took the stock off his hands and gave him his personal check for the payments which Schultz had made on the note through salary deductions.

In September, 1930, Schultz again sought employment with the company, and Eskilson told him of the stock arrangement for the employees, namely, that if he worked for the company he would be expected to take a thousand dollars worth of stock, as he had done on the previous occasions. Within a short time ten shares of the capital stock and a note for $1,000.00 were presented to Mr. Schultz. The note was signed by Schultz and taken by the company to the First State Bank of Beecher, and the bank advanced the money on the note. As Schultz continued to work for the company, deductions were made from his wages twice each month, and applied on the note. The note was due one year after date. At the end of the year, Schultz's attention was called to this fact and he gave a new note for $725.00, and his old note was surrendered to him. This transaction took place at the First State Bank of Beecher. After the new note was made, Schultz continued his employment, and $98.00 more was paid on the principal of the note. At this time he was discharged by the plaintiff, and Schultz thereupon ceased making payments on the note, and the bank, under a former arrangement, called upon the plaintiff corporation to take the note off its hands. This was done, and the D ixie Dairy Company purchased the note from the bank for its face value less

Jergen Anderson. The Dixie Dairy Company had no notice of this sale until it was necessary to record the transfer of this stock on the books of the company. Then the company found that Mr. Schultz had sold his stock, Mr. Makilson again requested Mr. Schultz to become a stockholder, and he purchased another thousand dollars' worth of stock upon the same terms and arrangements as the first purchase. On the second purchase of stock Schultz paid approximately $100.00, and then his employment was terminated with the company and Makilson personally took the stock off his hands and gave him his personal check for the payments which Schultz had made on the note through salary deductions.

In September, 1930, Schultz again sought employment with the company, and Makilson told him of the stock arrangement for the employees, namely, that if he worked for the company he would be expected to take a thousand dollars worth of stock, as he had done on the previous occasions. Within a short time ten shares of the capital stock and a note for $1,000.00 were presented to Mr. Schultz. The note was signed by Schultz and taken by the company to the First State Bank of Beecher, and the bank advanced the money on the note. As Schultz continued to work for the company, deductions were made from his wages twice each month, and applied on the note. The note was due one year after date. At the end of the year, Schultz's attention was called to this fact and he gave a new note for $725.00, and his old note was surrendered to him. This transaction took place at the First State Bank of Beecher. After the new note was made, Schultz continued his employment, and $98.00 more was paid on the principal of the note. At this time he was discharged by the plaintiff, and Schultz thereupon ceased making payments on the note, and the bank, under a former arrangement, called upon the plaintiff corporation to take the note off its hands. This was done, and the Dixie Dairy Company purchased the note from the bank for its face value less

the credited payments. This balance of $626.00 was paid by the plaintiff to the bank, and the note and stock were delivered to the Dixie Dairy Company.

In December, 1931, Mr. Schultz brought suit against Mr. Eskilson individually, claiming that Eskilson had promised to pay him any monies deducted from his wages for the purchasing of the stock. Mr. Eskilson denied any such arrangement and denied liability, but judgment was entered against Eskilson and in favor of Schultz for $490.00. At the January term of the Circuit Court the Dixie Dairy Company entered suit against Mr. Schultz, and took a judgment by confession upon said note in the amount of $925.05. This represents $626.00 principal, $151.05 interest, and $150.00 for attorneys' fee. At the March term of court, of the same year, Schultz appeared and asked that the judgment be set aside and leave given him to plead and set forth his defense to the action. He filed affidavits in support of his motion. The court sustained the motion and granted him leave to file his pleas, which he did. The cause was heard before the court without a jury. The court found for the defendant, and dismissed the suit at the plaintiff's cost. It is from this judgment that the original plaintiff has brought the suit to this court for review.

It is insisted by the appellant that the affidavit in support of appellee's motion to vacate the judgment and for leave to plead, does not set forth facts with sufficient certainty to authorize the court to open up the judgment and give the defendant leave to present his defense. The appellee has not seen fit to answer the appellant's argument in this assignment of error. We are inclined to think there is some merit in the appellant's contention, but we have decided to take the case on the merits and not pass on the sufficiency of the affidavit.

The suit in question is between the Dixie Dairy Company, an

the credited payments. The balance of $570.00 was paid by the plaintiff to the bank, and the note and stock were delivered to the Dixie Dairy Company.

In December, 1931, Mr. Connlin brought suit against Mr. Ruhlison individually, claiming that Ruhlison had promised to pay him any monies deducted from his wages for the purchasing of the stock. Mr. Ruhlison denied any such arrangement and denied liability, but judgment was entered against Ruhlison and in favor of Connlin for $430.00. At the January term of the circuit court the Dixie Dairy Company entered suit against Mr. Connlin, and took a judgment by confession upon said note in the amount of $925.05. This represents $826.00 principal, $123.05 interest, and $100.00 for attorneys' fee. At the March term of court, of the same year, Connlin appeared and asked that the judgment be set aside and leave given him to plead and set forth his defense to the action. He filed affidavits in support of his motion. The court sustained the motion and granted him leave to file his pleas, which he did. The cause was heard before the court without a jury. The court found for the defendant, and dismissed the suit at the plaintiff's cost. It is from this judgment that the original plaintiff has brought the suit to this court for review.

It is insisted by the appellant that the affidavit in support of appellee's motion to vacate the judgment and for leave to plead, does not set forth facts with sufficient certainty to authorize the court to open up the judgment and give the defendant leave to present his defense. The appellee has not seen fit to answer the appellant's argument in this assignment of error. We are inclined to think there is some merit in the appellant's contention, but we have decided to take the case on the merits and not pass on the sufficiency of the affidavit.

The suit in question is between the Dixie Dairy Company, an

Illinois corporation, against Henry Schultz. When Eskilson called a meeting of the employees and told them the policy of the company, he was acting as a representative of the Dixie Dairy Company, and not in an individual capacity. What Mr. Eskilson may have done at previous times in redeeming the stock for Schultz has no bearing upon the merits of this case. Schultz knew that the company required all employees to subscribe for stock, for he had done so on two previous occasions. Whether Mr. Eskilson, as an individual, had promised to reimburse Schultz for the money he had expended for the purchasing of stock, which had been deducted from his salary and applied on the purchase price of the stock, is immaterial to the issues in the case, as the Dixie Dairy Company is the owner of the note and is sueing in its corporate capacity.

A great deal has been said about the equities of the case. This cannot be considered because this is not an equity case, but a suit at law on a promissory note. It is our conclusion that the defense set forth in the affidavit and in the proof is not sufficient to overcome the rights of the plaintiff and that the trial court erred in setting aside the judgment and dismissing the suit.

The judgment of the Circuit Court of Will County is hereby reversed and the cause remanded to said Court, with directions to dismiss the order to open the judgment, and to enter an order to the effect that the judgment originally entered by confession should stand in full force and effect.

Reversed and remanded.

Illinois corporation, against Henry Schultz. Ben Erickson called a meeting of the employees and told them the policy of the company, he was acting as a representative of the Dixie Dairy Company, and not in an individual capacity. That Mr. Erickson may have done at previous times in redeeming the stock for Schultz has no bearing upon the merits of this case. Schultz knew that the company required all employees to subscribe for stock, for he had done so on two previous occasions. Whether Mr. Erickson, as an individual, had promised to reimburse Schultz for the money he had expended for the purchasing of stock, which had been deducted from his salary and applied on the purchase price of the stock, is immaterial to the issues in the case, as the Dixie Dairy Company is the owner of the note and is suing in its corporate capacity.

A great deal has been said about the equities of the case. This cannot be considered because this is not an equity case, but a suit at law on a promissory note. It is our conclusion that the defense set forth in the affidavit and in the proof is not sufficient to overcome the rights of the plaintiff and that the trial court erred in setting aside the judgment and dismissing the suit.

The judgment of the Circuit Court of Will County is hereby reversed and the cause remanded to said Court, with directions to dismiss the order to open the judgment, and to enter an order to the effect that the judgment originally entered by confession should stand in full force and effect.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

9268

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On APR 28 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9268 Agenda No. 5

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1938.

George Ahrens and Bertha Ahrens,

Appellees,

vs.

Clay Hopper and Lena Hopper,

Appellants.

Appeal from the Circuit Court of Will County.

DOVE - P.J.

The complaint in this cause, verified by both plaintiffs, alleged that on July 23, 1923 the plaintiffs were seized in fee simple of certain described premises improved by a dwelling and located at 3760 Stella Boulevard in the Village of Steger, Will County, Illinois, that on that day they entered into a contract with the defendants by the terms of which plaintiffs agreed to sell and the defendants agreed to purchase the same for $2800.00, of which $300 was to be paid upon the execution and delivery of said contract and the balance to be paid in monthly installments of $20.00 each, beginning August 1, 1923, said monthly payments to be applied, first in the payment of interest at the rate of six per cent annually, said interest to be paid monthly on the balance of the contract remaining from time to time unpaid and the balance of said monthly payments to be applied toward the payment of the principal. It was further alleged that since April 1, 1933, the defendants have made no payments under the contract but have defaulted and that prior to that time they paid the aggregate sum of $2640.10, of which $1191.06 was applied on account of interest and the balance of $1449.04 was applied to the principal sum. It was further alleged that the defendants failed to pay the general

Gen. No. 9234 Cause No. 3

IN THE
APPELLATE COURT OF ILLINOIS
SOUTH DISTRICT

February Term, A.D. 1934.

George Lyons and Bertha
Ahrens,

Appellees,

Appeal from the Circuit
Court of Will County.

vs.

Clay Hopper and Lena Hopper,

Appellants.

DOVE - P.J.

The complaint in this cause, verified by both plaintiffs, alleged that on July 24, 1923 the plaintiffs were seized in fee simple of certain described premises improved by a dwelling and located at 3760 Stella Boulevard in the Village of Steger, Will County, Illinois, that on that day they entered into a contract with the defendants by the terms of which plaintiffs agreed to sell and the defendants agreed to purchase the same for $3500.00, of which $300 was to be paid upon the execution and delivery of said contract and the balance to be paid in monthly installments of $20.00 each, beginning August 1, 1923, said monthly payments to be applied, first in the payment of interest at the rate of six per cent annually, said interest to be paid monthly on the balance of the contract remaining from time to time unpaid and the balance of said monthly payments to be applied toward the payment of the principal. It was further alleged that since April 1, 1923, the defendants have made no payments under the contract but have defaulted and that prior to that time they paid the aggregate sum of $2540.10, of which $1191.05 was applied on account of interest and the balance of $1449.04 was applied to the principal sum. It was further alleged that the defendants failed to pay the general

taxes for 1932, 1933, 1934 and 1935, together with certain special assessments and insurance as provided by the contract and that by reason of the defaults the plaintiffs, on April 21, 1936, caused a notice of forfeiture to be served on the defendants and on May 30, 1936 caused to be served upon them a demand for possession of said premises, which were then occupied by defendants. The complaint then charged that the defendants, although requested, have refused to surrender possession thereof to the plaintiffs and the complaint prayed for judgment that the contract be declared null and void and removed as a cloud upon plaintiffs' title, that the interest of the defendants be declared fictitious and that a writ of assistance or restitution be issued so that plaintiffs may be placed in possession of their property.

The answer of the defendants neither admitted or denied that the plaintiffs were the owners of the premises described in the complaint. They denied that on July 23, 1923 the defendants entered into a contract with both the plaintiffs and alleged that the defendants did enter into such a contract as set forth in the complaint and for the purchase of the premises therein described with George Ahrens but allege that Bertha S. Ahrens did not sign said contract. They admit that they made the payments under said contract to the amount of $2640.10 as alleged in the complaint, but allege that they ceased to continue to make the payments of $20.00 per month as provided by the contract because they were advised by their attorney that George Ahrens was not the owner in fee of said premises and could not convey to them a good title. The answer of these defendants admitted they were in possession of said premises, denied that notice of forfeiture was served upon them on April 21, 1936, but admit that demand for possession was served upon themon May 30, 1936. They admit that they refused to surrender possession thereof to the plaintiffs, contend they are legally entitled to possession and state the fact to be that at the time the contract was entered into the premises were only reasonably worth $1300.00.

taxes for 1925, 1926, 1927 and 1928, together with certain special assessments and insurance as provided by the contract and that by reason of the default the plaintiff, on April 21, 1928, caused a notice of forfeiture to be served on the defendants and on May 21, 1928 caused to be served upon them a demand for possession of said premises, which were then occupied by defendants. The complaint then charged that the defendants, although requested, have refused to surrender possession thereof to the plaintiff and the plaintiff prayed for judgment that the contract be declared null and void and removed as a cloud upon plaintiff's title, that the interest of the defendants be declared forfeited and that a writ of assistance or restitution be issued so that plaintiff may be placed in possession of their property.

The answer of the defendants neither admitted nor denied that the plaintiffs were the owners of the premises described in the complaint. They denied that on July 23, 1927 the defendants entered into a contract with both the plaintiffs and alleged that the defendants did enter into such a contract as set forth in the complaint and for the purchase of the premises therein described with George Ahrens but allege that Bertha A. Ahrens did not sign said contract. They admit that they made the payments under said contract to the amount of $5840.10 as alleged in the complaint, and allege that they asked to continue to make the payments of $40.00 per month as provided by the contract because they were advised by their attorney that George Ahrens was not the owner in fee of said premises and could not convey to them a good title. The answer of these defendants admitted they were in possession of said premises, denied that notice of forfeiture was served upon them on April 21, 1928, but admit that demand for possession was served upon them May 30, 1928. They admit that they refused to surrender possession thereof to the plaintiffs, contend they are legally entitled to possession and state the fact to be that at the time the contract was entered into the premises were only reasonably worth $1500.00.

As a separate and distinct defense it was alleged that on July 19, 1934 the plaintiff George Ahrens instituted forcible detainer proceedings against these defendants to recover possession of said premises, that a trial was had resulting in a judgment in favor of the defendants. That subsequently the plaintiffs instituted an ejectment proceeding against the defendants to eject the defendants from their possession of said premises which was tried and resulted in a judgment in favor of the defendants. It was further alleged that subsequently the plaintiffs instituted another forcible entry and detainer suit against the defendants to recover possession of said premises and that while that proceeding was pending the defendants procured from the Circuit Court of Will County a permanent injunction restraining the plaintiffs from prosecuting that suit. By reason of these several judgments and decree, defendants insist in their answer that the doctrine of res judicata applies and that plaintiffs are not entitled to maintain or prosecute this proceeding.

The cause was heard in open court by the chancellor, resulting in a decree cancelling the contract of July 23, 1923, decreeing that the defendants have no further interest in the premises herein described and directing them to deliver up possession thereof to the plaintiffs on or before July 1, 1937 and that upon a failure so to do, that a writ of assistance issue. The court further decreed that all moneys theretofore paid by the defendants to the plaintiffs under the contract is considered as rent for said premises to and including July 1, 1937. To reverse this decree the defendants below have prosecuted this appeal.

We have read the evidence as abstracted and it fully sustains the material allegations of plaintiffs' complaint. From the evidence and the stipulations of the parties, it appears that the appellees were the owners of the premises involved herein as joint tenants on July 23, 1923 and had been since 1921, that on July 23, 1923 appellants executed a written agreement to purchase the same for $2800.00 upon the terms set forth in the complaint, that under that

in a separate and distinct defense it was alleged that on July 12, 1934 the plaintiff George Green instituted forcible detainer proceeding against these defendants to recover possession of said premises, that a trial was had resulting in a judgment in favor of the defendants. That subsequently the plaintiffs instituted an ejectment proceeding against the defendants to eject the defendants from their possession of said premises which was tried and resulted in a judgment in favor of the defendants. It was further alleged that subsequently the plaintiffs instituted another forcible entry and detainer suit against the defendants to recover possession of said premises and that while that proceeding was pending the defendants procured from the circuit court of Will County a permanent injunction restraining the plaintiffs from prosecuting that suit. By reason of these several judgments and decree, defendants insist in their answer that the doctrine of res judicata applies and that plaintiffs are not entitled to maintain or prosecute this proceeding.

The cause was heard in open court by the chancellor, resulting in a decree consisting the contract of July 12, 1933, decreeing that the defendants have no further interest in the premises therein described and directing them to deliver up possession thereof to the plaintiffs on or before July 1, 1937 and that upon a failure so to do, that a writ of assistance issue. The court further decreed that all moneys theretofore paid by the defendants to the plaintiffs under the contract is considered as rent for said premises to and including July 1, 1937. To reverse this decree the defendants below have prosecuted this appeal.

We have read the evidence as abstracted and it fully sustains the material allegations of plaintiffs' complaint. From the evidence and the stipulations of the parties, it appears that the appellees were the owners of the premises involved herein as joint tenants on July 22, 1932 and had been since 1931, that on July 23, 1932 appellants executed a written agreement to purchase the same for $2300.00 upon the terms set forth in the complaint, that under that

agreement appellants went into possession of said premises and were living thereon at the time of this hearing. That they made monthly payments according to the provisions of said contract from July 23, 1923 to May, 1933 and it was stipulated upon the hearing that on April 1, 1936 there remained due appellees, under the contract, the sum of $1795.47.

Counsel for appellants insist that inasmuch as the evidence offered on their behalf discloses that prior to the commencement of the instant suit an ejectment suit and also a forcible entry and detainer suit involving the premises involved here had previously been litigated to judgments, that therefore the doctrine of res adjudicata applies and that the chancellor should have so held. We do not think there is any merit in this contention. In People v. Hart, 332 Ill. 467, at page 471, the court said: "Where a former adjudication is relied upon as an absolute bar, there must be, as between the actions, identity of parties, of subject matter and of cause of action." It is true that our courts recognize both the doctrine of estoppel by judgment and of estoppel by verdict. The difference between these two estoppels is briefly expressed in City of Chicago v. Cameron, 120 Ill. 447 at page 459 where it is said: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second suit upon the same cause of action, and its effect as an estoppel in another suit between the same parties upon a different cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. But where the second suit is upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, and only upon that is the judgment conclusive in another action. This distinction is very clearly pointed out in Cromwell v. County of Sac, 94 U.S. 351." In Keeley Brewing Co. v. Mason, 116 Ill. App. 603, at page 604, the court said: "When the cause of action in a second case is different from that of a previous suit between the same parties, the judgment in the former case is not res judicata

appellant appellants were in possession of said premises and were living thereon at the time of this hearing. They made monthly payments according to the provisions of said contract from July 23, 1923 to May, 1932 and it was stipulated upon the hearing that on April 1, 1926 there remained due appellees, under the contract, the sum of $1703.47.

Counsel for appellants insist that inasmuch as the evidence offered on their behalf discloses that prior to the commencement of the instant suit an ejectment suit and also a forcible entry detainer suit involving the premises involved here had previously been litigated to judgments, that therefore the doctrine of res adjudicata applies and that the chancellor should have so held. We do not think there is any merit in this contention. In People v. Hart, 332 Ill. 467, at page 471, the court said: "Where a former adjudication is relied upon as an absolute bar, there must be, as between the actions, identity of parties, of subject matter and of cause of action." It is true that our courts recognize both the doctrine of estoppel by judgment and of estoppel by verdict. The difference between these two estoppels is briefly expressed in City of Chicago v. Cameron, 190 Ill. 447 at page 450 where it is said: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second suit upon the same cause of action, and its effect as an estoppel in another suit between the same parties upon a different cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. But where the second suit is upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, and only upon that is the judgment conclusive in another action. This distinction is very clearly pointed out in Cromwell v. County of Sac, 94 U.S. 351." In Keeley Brewing Co. v. Mead, 118 Ill. App. 603, at page 606, the court said: "When the cause of action in a second case is different from that of a previous suit between the same parties, the judgment in the former case is not res judicata

unless it appears that the identical question raised in the latter suit was in fact adjudicated in the former." See also People v. Hart, supra, and Hoffman v. Hoffman, 330 Ill. 413.

In the instant case the record discloses that the plaintiff in the first forcible entry and detainer proceeding was George Ahrens and that Bertha Ahrens was not a party thereto. The question that is determinative of the instant suit was not necessarily raised or determined in either the forcible detainer or ejectment action. In neither were the issues the same as here, and in order for those judgments to be a bar to the present proceeding it must appear that the issues here were material issues in the former proceedings and that they were necessarily determined by those judgments. The presumption is that the court in rendering the judgments that were rendered in the former proceedings determined only such questions as were necessarily involved and applicable to the relief sought and those only. Wells v. Robertson, 277 Ill. 534. See also Brown v. Brown, 286 Ill. App. 471.

Counsel for appellants further insist that the agreement for a deed executed by them on July 23, 1923 was never, as a matter of fact, introduced in evidence and consequently that there was no evidence to sustain the averments of the complaint charging that appellants had defaulted and forfeited their contract. The record discloses that this agreement was upon the hearing marked as plaintiffs' Exhibit 2 and identified by appellee George Ahrens while he was testifying. The Court reserved its ruling upon the admissibility of this exhibit at that time and the record does not disclose that the court ever formally announced his ruling thereon, but it is apparent from the decree that was rendered that the chancellor treated this exhibit as in evidence. Furthermore an examination of the record discloses that counsel for appellants offered in evidence the original complaint filed in the Circuit Court of Will County on November 13, 1934 by appellants and against appellees and the decree rendered thereon which restrained appellees from further prosecuting the last forcible detainer proceeding which they had instituted to recover possession of the premises in controversy here. The complaint was verified by appellants and alleged

unless it appears that the trial court failed in the latter suit was in fact adjudicated in the former." See also People v. Hart, supra, and Gottman v. Gottman, 280 Ill. 419.

In the instant case the record discloses that the plaintiff in the first forcible entry and detainer proceeding was George Ahrens and that Bertha Ahrens was not a party thereto. The question that is determinative of the instant suit was not necessarily raised or determined in either the forcible detainer or ejectment action. In neither were the issues the same as here, and in order for those judgments to be a bar to the present proceeding it must appear that the issues here were material issues in the former proceedings and that they were necessarily determined by those judgments. The presumption is that the court in rendering the judgments that were rendered in the former proceedings determined only such questions as were necessarily involved and applicable to the relief sought and those only. Tolle v. Robertson, 277 Ill. 554. See also Brown v. Brown, 288 Ill. 491.

Counsel for appellants further insist that the agreement for a deed executed by them on July 25, 1950 was never, as a matter of fact, introduced in evidence and consequently that there was no evidence to sustain the averments of the complaint charging that appellants had defaulted and forfeited their contract. The record discloses that this agreement was upon the hearing marked as plaintiffs' Exhibit 3 and identified by appellee George Ahrens while he was testifying. The Court reserved its ruling upon the admissibility of this exhibit at that time and the record does not disclose that the court ever formally announced his ruling thereon, but it is apparent from the decree that was rendered that the chancellor treated this exhibit as in evidence. Furthermore an examination of the record discloses that counsel for appellants offered in evidence the original complaint filed in the Circuit Court of Will County on November 15, 1954 by appellants and against appellees and the decree rendered thereon which restrained appellees from further prosecuting the last forcible detainer proceeding which they had instituted to recover possession of the premises in controversy here. The complaint was verified by appellants and alleged

that they had entered into the written contract of July 23, 1923 with appellee George Ahrens and made a copy thereof a part of their complaint, and this instrument appears in full on pages 136, 137, 138, 139, 140, 141, 142, 143, 144, 145 and 146 of the record in the instant case. Furthermore, appellee George Ahrens testified without objection that appellees were the owners of the premises involved herein having acquired them in 1921, and that he, George Ahrens, entered into an agreement with appellants for the sale of the premises and that a copy of the original agreement was given appellants, that on the outside of said agreement (Plaintiff's Exhibit 2) appear notations of payments made by appellants on the days, months and years as thereon indicated, that appellants made payments from the 23rd of July, 1923, to May, 1933, that they did not pay the taxes after 1931, that he, Ahrens, paid the taxes for the year 1931 and all subsequent years, that the purchase price, according to the agreement, was $2800.00 with six per cent interest, that $20.00 and interest was to be paid on the first of each month and that the amount due appellees since appellants stopped paying in May, 1933 is $1384.84 with six per cent interest thereon. The contract of sale as found on pages 136 to 146 of this record recites that it is an agreement made between appellants and appellees and by its provisions appellants obligated themselves to pay $2800.00 for the premises involved in this proceeding, that $300.00 was paid in cash on July 23, 1923, the date of the contract, and appellants were to pay the balance in equal monthly installments of $20.00 each with six per cent interest, that the time of payment was made the essence of the contract and by its provisions appellants further obligated themselves to pay all taxes, assessments or impositions legally levied upon said premises subsequent to 1922, that in case of their failure to make either of the payments or any part thereof or perform any of the covenants thereby made and entered into, that then the contract, at the option of appellees, should become forfeited and determined and appellants should forfeit all payments made by them under the contract and such payments should be retained by appellees in full satisfaction and liquidation of all damages by

that they had entered into the written contract of July 28, 1922 with appellee George Arens and made a copy thereof a part of their complaint and this instrument appears in full on pages 133, 137, 138, 139, 140, 141, 142, 143, 144, 145 and 146 of the record in the instant case. Furthermore, appellee George Arens testified without objection that appellees were the owners of the premises involved herein having acquired them in 1921, and that he, George Arens, entered into an agreement with appellants for the sale of the premises and that a copy of the original agreement was given appellants, that on the outside of said agreement (Plaintiff's Exhibit 2) appear notations of payments made by appellants on the days, months and years as therein indicated, that appellants made payments from the 28th of July, 1922, to May, 1923, that they did not pay the taxes after 1921, that he, Arens, paid the taxes for the year 1921 and all subsequent years, that the purchase price, according to the agreement, was $2500.00 with six per cent interest, that $50.00 and interest was to be paid on the first of each month and that the amount due appellees since appellants stopped paying in May, 1923 is $1384.84 with six per cent interest thereon. The contract of sale as found on pages 133 to 146 of this record recites that it is an agreement made between appellants and appellees and by its provisions appellants obligated themselves to pay $2500.00 for the premises involved in this proceeding, that $200.00 was paid in cash on July 28, 1922, the date of the contract, and appellants were to pay the balance in equal monthly installments of $50.00 each with six per cent interest, that the time of payment was made the essence of the contract and by its provisions appellants further obligated themselves to pay all taxes, assessments or impositions legally levied upon said premises subsequent to 1920, that in case of their failure to make either of the payments or any part thereof or perform any of the covenants thereby made and entered into, that then the contract, at the option of appellees, should become forfeited and determined and appellants should forfeit all payments made by them under the contract and such payments should be retained by appellees in full satisfaction and liquidation of all damages by

them sustained and they should have the right to re-enter and take possession of the said premises. Counsel for appellants are therefore in error when they state that the record in this case is silent as to what the provisions and conditions of this contract are with reference to forfeiture and the right of appellees to take possession of the premises. Upon the hearing it was stipulated that appellees paid the general taxes for the years 1932, 1933, 1934 and 1935 and certain special assessments and that on April 1, 1936 there was due appellees from appellants under said agreement for principal, interest and taxes the sum of $1795.47. While counsel for appellees should have requested a ruling from the chancellor upon the admissibility of their "Exhibit 2", being the contract which forms the basis of this proceeding, still the record does not disclose that counsel for appellants made any objection to its introduction in evidence and from the record it is apparent, as we have said, that the chancellor treated this exhibit as admitted in evidence and appellants' contention that there is no evidence in the record upon which to base the decree cannot be sustained

It is finally insisted by counsel for appellants that the chancello erroneously decreed that the money theretofore paid to appellees by appellants under the contract should be considered as rent for said premises to and including July 1, 1937 and counsel argue that there was no evidence offered as to the fair rental value of the premises during the term appellants occupied the same and that there is no allegation in the complaint to the effect that a failure of appellants to make the payments as provided by the contract would warrant appellees in retaining the payments made by appellants as rent. This is true, there is no allegation in the complaint as to the right of appellees to retain the payments made by appellants as rent for the premises and there is no evidence in the record as to the rental value of the premises, but the contract itself provided that in the event of default and a breach of its covenants on the part of appellants that then all moneys paid thereunder should be forfeited and retained by appellees in full satisfaction and in liquidation of all damages by them sustained

than restored and they should have the right to re-enter and take possession of the said premises. Counsel for appellants are therefore in error when they state that the record in this case is silent as to what the provisions and conditions of this contract are with reference to forfeiture and the right of appellees to take possession of the premises. Upon the hearing it was explained that appellees paid the general taxes for the years 1934, 1935, 1936 and 1938 and certain special assessments and that on April 1, 1938 there was due appellees from appellants under said agreement for principal, interest and taxes the sum of $1763.47. While counsel for appellees should have requested a ruling from the commissioner upon the admissibility of their "exhibit 2", being the contract which forms the basis of this proceeding, still the record does not disclose that counsel for appellants made any objection to its introduction in evidence and from the record it is apparent, as we have said, that the commissioner treated this exhibit as admitted in evidence and appellants' contention that there is no evidence in the record upon which to base the decree cannot be sustained.

It is finally insisted by counsel for appellants that the commissioner erroneously decreed that the money therefore paid to appellees by appellants under the contract should be considered as rent for said premises to and including July 1, 1937 and counsel argue that there was no evidence offered as to the fair rental value of the premises during the time appellants occupied the same and that there is no allegation in the complaint to the effect that a failure of appellants to make the payments as provided by the contract would warrant appellees in retaining the payments made by appellants as rent. This is true, there is no allegation in the complaint as to the right of appellees to retain the payments made by appellants as rent for the premises and there is no evidence in the record as to the rental value of the premises, but the contract itself provided that in the event of default and a breach of the covenants on the part of appellants that then all moneys paid thereunder should be forfeited and retained by appellees in full satisfaction and in liquidation of all damages by them sustained.

The evidence is that appellants defaulted and breached the covenants of their agreement, that appellees had a right under the contract to declare a forfeiture thereof because of appellants default, that appellees exercised their option as provided by the contract and declared the contract forfeited and so notified appellants, that having done so the contract then gave them a right to retain the moneys paid by appellants under the contract in full satisfaction and in liquidation of all damages by them sustained. We are unable to see how this objected to portion of the decree can be said to have in any way injured appellants. They admit they are in possession of appellees' property and that they went into possession by virtue of a contract, the provisions of which they have failed to comply with since May, 1933. They have thwarted every attempt which appellees have made to gain possession of that which is rightfully and legally theirs. As a general rule the failure to perform a contract or some one or more of its provisions does not justify the equitable relief of cancellation and ordinarily, in the case of a mere breach of contract, equity courts will remit the party complaining to his remedy at law. 9 Am. Jur. 373-4. In the instant case, however, counsel for appellants did not raise this question in their answer or in the lower court and have not argued or presented this question to this court. Whether the legal remedies available to appellees were adequate and whether appellees had a right to invoke the equitable jurisdiction of the Circuit Court for the purpose of cancelling the contract of July 23, 1923 and restoring themselves to the possession of their property is therefore not before us. The equities, as shown by the record which we are reviewing, are clearly with appellees and the decree will therefore be affirmed.

DECREE AFFIRMED.

The evidence is that appellants defaulted and breached the covenants of their agreement, that appellees had a right under the contract to declare a forfeiture upon default because of appellants default, that appellees exercised their option as provided by the contract and declared the contract forfeited and no modified appellants, that having done so the contract then gave them a right to retain the money paid by appellants under the contract in full satisfaction and in liquidation of all damages by them sustained. We are unable to see how this objected to portion of the decree can be said to have in any way injured appellants. They admit they are in possession of appellees' property and that they went into possession by virtue of a contract, the provisions of which they have failed to comply with since May, 1925. They have thwarted every attempt which appellees have made to gain possession of that which is rightfully and legally theirs. In a general rule the failure to perform a contract or some one or more of its provisions does not justify the equitable relief of cancellation and ordinarily, in the case of a mere breach of contract, equity courts will resist the party complaining to his remedy at law. 9 Am. Jur. 373-4. In the instant case, however, counsel for appellants did not raise this question in their answer or in the lower court and have not argued or presented this question to this court. Whether the legal remedies available to appellees were adequate and whether appellees had a right to invoke the equitable jurisdiction of the Circuit Court for the purpose of cancelling the contract of July 23, 1923 and restoring themselves to the possession of their property is therefore not before us. The equities, as shown by the record which we are reviewing, are clearly with appellees and the decree will therefore be affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9v71

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On APR 28 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9271 Agenda No. 20

In the Appellate Court of Illinois

Second District

February Term, A.D. 1938

C. K. Anderson,

Appellee,

vs.

Hattie A. Chinn and

Percy E. Chinn,

Appellants,

Appeal from the Circuit Court of Lake County

DOVE, P. J.

This was a suit instituted by C. K. Anderson to foreclose a trust deed executed by Hattie A. and Percy E. Chinn. After the issues were made up, the cause was referred to a Special Master-in Chancery who took the testimony and recommended a decree in favor of the plaintiff. Upon a hearing before the Chancellor, the exceptions of the defendants to the Master's report were overruled and the usual decree of foreclosure and sale was rendered which followed the Master's findings. From this decree the defendants have perfected this appeal.

The complaint was filed on February 4, 1935 and is in the usual form. It alleged that the appellants on June 4, 1927 were indebted in the sum of $7500.00 and evidencing that indebtedness, they executed their note for that sum payable to bearer, five years after date with 6½% interest per annum, interest payable semi-annually; that to secure the payment thereof appellants executed their trust deed to Robert C. Abt, trustee, which provided, among other things, that appellants covenanted and agreed to pay $250.00 semi-annually to be applied upon the reduction of the principal sum secured by said trust deed, said semi-annual payments of $250.00 to begin three years after the date of the trust deed. It was further alleged that after the maturity of said note an

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In the Appellate Court of Illinois

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February Term, A.D. 1938

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Appeal from the Circuit Court

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Percy E. Ohlum,

Appellants.

DEVE, P. J.

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The complaint was filed on February 4, 1935 and is in the usual form. It alleged that the appellants on June 4, 1927 were indebted in the sum of $7500.00 and evidencing that indebtedness, they executed their note for that sum payable to bearer, five years after date with 6% interest per annum, interest payable semi-annually; that to secure the payment thereof appellants executed their trust deed to Robert C. Ebt, trustee, which provided, among other things, that appellants covenanted and agreed to pay $250.00 semi-annually to be applied upon the reduction of the principal sum secured by said trust deed, said semi-annual payments of $250.00 to begin three years after the date of the trust deed. It was further alleged that after the maturity of said note an

agreement was entered into by the parties hereto extending the payment of the unpaid portion of said principal note from June 4, 1932 to June 4, 1934. The appellants, by their answer, denied the execution and delivery of the promissory note referred to in the complaint, denied that the copies of the note and trust deed attached to the complaint were true copies of any note or trust deed executed by them, denied that appellee was entitled to any relief and asked that the complaint be dismissed. By an amendment to their answer, appellants alleged that the loan was secured from the First National Bank of Antioch and at that time appellee was president of that bank, Robert C. Abt was vice-president and S. Boyer Nelson was cashier; that they pretended to make a loan to appellants in the sum of $7500.00 but after securing their note and mortgage, they failed to pay over to appellants said sum but paid on account of an existing mortgage against said premises $5,756.30, leaving $1743.70 un accounted for, that in addition to deducting said sum of $1743.70, an interest charge of 6½% was exacted and that said loan was therefore usurious. In the amendment to the answer, it was also alleged that since the note and trust deed were delivered, they were both materially altered by inserting therein the following clause: "We promise to pay the sum of $250.00 semi-annually on this note beginning three years after the date hereof at the same place in the same manner as above." To this amendment, appellee replied, denying the allegations that Abt, Boyer and himself pretended to make a loan of $7500.00 to appellants but alleged that appellee made said loan and that the proceeds thereof were paid to the creditors of appellants at their direction; that all proceeds of said loan were accounted for and that there is not due appellants any sum whatever. By his reply appellee set up the extension agreement of July, 1932 executed by all the parties hereto and referred to in the complaint and alleged that on or about November 8, 1934 another extension agreement was executed

agreement was entered into by the parties hereto extending the payment of the unpaid portion of said principal note from June 4, 1933 to June 4, 1934. The appellants, by their answer, denied the execution and delivery of the promissory note referred to in the complaint, denied that the copies of the note and trust deed attached to the complaint were true copies of any note or trust deed executed by them, denied that appellee was entitled to any relief and asked that the complaint be dismissed. By an amendment to their answer, appellants alleged that the loan was secured from the First National Bank of Antioch and at that time appellee was president of that bank, Robert G. Abt was vice-president and E. Boyer Nelson was cashier; that they pretended to make a loan to appellants in the sum of $7500.00 but after securing their note and mortgage, they failed to pay over to appellants said sum but paid on account of an existing mortgage against said premises $4,758.30, leaving $1743.70 unaccounted for, that in addition to deducting said sum of $1743.70, an interest charge of $[illegible] was exacted and that said loan was therefore usurious. In the amendment to the answer, it was also alleged that since the note and trust deed were delivered, they were both materially altered by inserting therein the following clause: "We promise to pay the sum of $350.00 semi-annually on this note beginning three years after the date hereof at the same place in the same manner as above." To this amendment, appellee replied, denying the allegations that Abt, Boyer and himself pretended to make a loan of $7500.00 to appellants but alleged that appellee made said loan and that the proceeds thereof were paid to the creditors of appellants at their direction; that all proceeds of said loan were accounted for and that there is not due appellants any sum whatever. By his reply appellee set up the extension agreement of July, 1932 executed by all the parties hereto and referred to in the complaint and alleged that on or about November 8, 1934 another extension agreement was executed

by appellants and delivered by them to appellee but averring that he declined to accept the same. Appellee's reply denied that the transaction was usurious and averred that the clause set forth in the answer as amended as a part of the trust deed and also a part of the note at the time they were delivered to appellee.

The evidence is that in June, 1927 appellant, Hattie A.Chinn, owned property in Antioch improved by a theatre, upon which there was a mortgage held by Dr. B. J. Corbin in the sum of $5500.00, which was past due. That Fred Warner also had a lien thereon. That appellee was at that time the president of the First National Bank of Antioch, Robert C. Abt was vice-president and S. Boyer Nelson was cashier thereof. The relationship betweeh Abt and appellee was at that time friendly. Abt had an office in a building adjoining the bank and was engaged in the real estate, insurance and mortgage loan business; that appellant Percy A Chinn went to see him about procuring a loan of $7500.00 upon the theatre property and that thereupon Abt took the matter up with appellee. Appellants called Abt as their witness and he testified that appellee told him that he appellee, would make the loan at 6½% interest and a 3% commission; that he, Abt, reported this conversation, which he had had with appellee, to appellants and advised them that appellee was going to take the loan personally; that the commission would be $225.00 and that appellants were led to believe that he, Abt, was their broker and that he was to receive this 3% commission, amounting to $225.00 for negotiating the loan and procuring the money from appellee. Abt further testified that he and Nelson received from appellee, to apply on this lown, the sum of $7275.00; that he and Nelson jointly disbursed this amount; that he, Abt, represented appellants and that all the disbursements were made with the knowledge and consent of appellants. Abt further testified that the custom for the bank was to get one-third of the commission, the party who furnished the money to receive one-third and he, Abt, would receive the remaining

by appellants and delivered by them to appellee but averring that he declined to accept the same. Appellee's reply denied that the transaction was fraudulent and averred that the clause set forth in the answer as amended as a part of the trust deed was also a part of the note at the time they were delivered to appellee.

The evidence is that in June, 1927 appellant, Hattie L. Quinn, owned property in Antioch improved by a theatre, upon which there was a mortgage held by Dr. E. J. Corbin in the sum of $5500.00, which was past due. Then Fred Harper also had a lien thereon. That appellee was at that time the president of the First National Bank of Antioch, Robert O. Lutz was vice-president and E. Hoyer Nelson was cashier thereof. The relationship between Lutz and appellee was at that time friendly. Lutz had an office in a building adjoining the bank and was engaged in the real estate, insurance and mortgage loan business; that appellant Mary Quinn went to see Lutz about procuring a loan of $7500.00 upon the theatre property and that thereupon Lutz took the matter up with appellee. Appellants called Lutz as their witness and he testified that appellee told him, that he appellee, would make the loan at 6% interest and a 3% commission; that he, Lutz, reported this conversation, which he had had with appellee, to appellants and advised them that appellee was going to take the loan personally; that the commission would be $225.00 and that appellants were to pay the expense of the loan; that appellants and for negotiating the loan and procuring the money from appellee. Lutz further testified that he and Nelson received from appellee, to apply on this loan, the sum of $2275.00; that he and Nelson jointly discussed this amount; that he, Lutz, represented appellants and that all the disbursements were made with the knowledge and consent of appellants. Lutz further testified that the custom for the bank was to get one-third of the commission, the party who furnished the money to receive one-third and he, Lutz, would receive the remaining

one-third, but that in the instant case appellee insisted upon all the commission. Abt further testified that he had other parties who would take this loan but that at the time appellee insisted upon taking all the commission that the loan had progressed to such an extent that he, Abt, didn't wish to negotiate it elsewhere, so he permitted appellee to take all the commission, and Abt received no part thereof. He further testified that the note and trust deed were never assets of the bank but were at all times the property of appellee.

At a subsequent hearing before the Master, Abt testified that he had refreshed his recollection since giving his previous testimony and that the commission charged appellants was $375.00 or 5% of the principal sum instead of $225.00 or 3% of the principal sum as he had previously testified to. Appellants testified that they had had no dealings with appellee and did not see him in connection with the making of this loan but that Abt represented them. They further testified that the commission was discussed with Abt at the time of the execution of the note and trust deed and that they knew a commission of 5% or $375.00 was being paid to procure the loan. Appellee testified that five per cent was charged for this loan of which he received two per cent and Abt received three per cent. Abt denied this and swore he never received anything for his services.

When Abt testified on February 7, 1936, he stated that appellee charged $225.00 commission in addition to the stipulated 6½% interest and he swore that he and Nelson received from appellee for distribution to the creditors of appellants the sum of $7275.00, which amount was the face of the loan after deducting said sum of $225.00. Mr. Abt further testified that he and Nelson jointly disbursed this entire amount and that appellants knew of this and were led to believe that he, Abt, was to receive said sum of $225.00 as commission for his services in procuring appellee to

one-third, but that in the instant case appellee insisted upon all the commission. Abt further testified that he and other parties who would take this loan but that at the time appellee insisted upon taking all the commission that the loan had progressed to such an extent that he, Abt, didn't wish to negotiate it elsewhere, so he permitted appellee to take all the commission, and Abt received no part thereof. He further testified that the note and trust deed were never assets of the bank but were at all times the property of appellee.

At a subsequent hearing before the Master, Abt testified that he had refreshed his recollection since giving his previous testimony and that the commission charged appellants was $375.00 or 5% of the principal sum instead of $225.00 or 3% of the principal sum as he had previously testified to. Appellants testified that they had had no dealings with appellee and did not see him in connection with the making of this loan but that Abt represented them. They further testified that the commission was discussed with Abt at the time of the execution of the note and trust deed and that they knew a commission of 5% or $375.00 was being paid to procure the loan. Appellee testified that five per cent was charged for this loan of which he received two per cent and Abt received three per cent. Abt denied this and swore he never received anything for his services.

When Abt testified on February 7, 1930, he stated that appellee charged $225.00 commission in addition to the stipulated 6% interest and he swore that he and Nelson received from appellee for distribution to the creditors of appellants the sum of $7275.00, which amount was the face of the loan after deducting said sum of $225.00. Mr. Abt further testified that he and Nelson jointly disbursed this entire amount and that appellants knew of this and were led to believe that he, Abt, was to receive said sum of $225.00 as commission for his services in procuring appellee to

furnish said sum of $7275.00. Mr. Abt again testified before the Master on March 20,1936, and at this time swore that he was mistaken in his former testimony and that the corredt amount which appellee retained was not $225;00 but $375.00 and that the amount Nelson and he distributed was $7125.00 instead of $7275.00. This later statement and the testimony of appellee as to the amount of commission charged appellants are in accord but appellee says that of this $275.00 commission, he appellee, retained $150.00 and that Abt got the balance of $225.00. Mr. Abt denied that he received this amount or any other sum from appellee for his services in connection with negotiating this loan. His testimony as abstracted by counsel for appellants is, "not one cent of the commission which I claim Mr. Anderson owes me on the Chinn account was included in that statement in that case," (referring to the Walworth case). The conclusion therefore, to be drawn from Mr. Abt's testimony is that he was to receive a portion of the commission which he charged appellants but he never received any part thereof from appellee and that appellee is therefore indebted to him for his portion of the commission. The testimony of appellee and Abt cannot be reconciled. They are not on friendly terms and have not been for four or five years. The animosity of Abt's feeling toward appellee is apparent. The special Master saw these witnesses and heard them testify and he gave more credence to the testimony of appellee than to the testimony of Mr. Abt. It was the province of the special Master to determine the facts and his findings are entitled to due weight. Pasedach v. Auw, 364 Ill. 491. The chancellor reviewed the report of the Master and concurred in his findings. We have likewise read all the evidence and are unable to say that the decree of the chancellor is manifestly against the weight of the evidence so far as the question of usury is concerned.

It is next insisted by counsel for appellants that after the execution of the note and trust deed and without the consent of

furnish said sum of $275.00. Mr. Ibt testified before the Master on March 20, 1938, and in this it is stated that he was mistaken in his former testimony and that the correct amount which appellee retained was not $125.00 but $275.00 and that the amount Nelson and he distributed was $125.00 instead of $275.00. This later statement and the testimony of appellee as to the amount of commission charged appellant are in accord but appellee says that of this $275.00 commission, he appellee, retained $150.00 and that Abt got the balance of $125.00. Mr. Ibt denied that he received this amount or any other sum from appellee for his services in connection with negotiating this loan. His testimony as abstracted by counsel for appellants is, "not one cent of the commission which I claim Mr. Anderson owes me on the Shaw account was included in that statement in that case," (referring to the Silvorth case). The conclusion therefore, to be drawn from Mr. Abt's testimony is that he was to receive a portion of the commission which he charged appellants but he never received any part thereof from appellee and that appellee is therefore indebted to him for his portion of the commission. The testimony of appellee and Abt cannot be reconciled. They are not on friendly terms and have not been for four or five years. The animosity of Abt's feeling toward appellee is apparent. The special Master saw these witnesses and heard them testify and he gave more credence to the testimony of appellee than to the testimony of Mr. Abt. It was the province of the special Master to determine the facts and his findings are entitled to due weight. Pasadoch v. Saw, 88 Ill. 421. The chancellor reviewed the report of the Master and concurred in his findings. He also likewise read all the evidence and are unable to say that the decree of the chancellor is manifestly against the weight of the evidence so far as the question of usury is concerned.

It is next insisted by counsel for appellants that after the execution of the note and trust deed and without the consent of

appellants, a typewritten rider was attached to the trust deed and a typewritten clause inserted in the note which materially altered the trust deed and note and which prohibits a recovery thereon. The rider attached to the trust deed is as follows: "The grantors further covenant and agree to pay the sum of $250.00 semi-annually on the principal note herein mentioned, said semi-annual payments to begin three years from the date hereof. ~~Said sums are to be applied three years from the date hereof.~~ Said sums are to be applied in the reduction of the principal sum secured hereby. It is further understood by the grantors herein that the above and foregoing covenants constitute one of the covenents and provisions of this trust deed, and that a failure so to do, as hereinbefore provided, will constitute a breach of the conditions of this trust deed. Signed Hattie A Chinn (Seal). Signed Percy E. Chinn (Seal)". The clause appearing above the signatures of the makers of the note is as follows: "We promise to pay the sum of $250.00 semi-annually on this note beginning three years after the date hereof at the same place and in the same manner as above." The original answer of appellants was sworn to by Hattie A. Chinn and it denied that appellants executed and acknowledged the note and trust deed involved in this proceeding. By their amendment to their answer filed on March 5, 1936 they averred that Abt, Nelson and appellee were all officers of the First National Bank of Antioch and that so acting they secured said note and trust deed from appellants and then, for the first time, alleged that the rider attached to the trust deed and the similar typewritten clause appearing in the note were not a part of said note or trust deed at the time the same were executed and delivered by appellants. This amendment was sworn to by appellant Percy E. Chinn. Upon direct examination Percy Chinn testified he never signed the rider on the trust deed. Upon cross-examination he admitted that the signature upon the rider was his signature. Mrs. Chinn testified that she had never seen the rider upon the trust deed before the hearing and that it was not on the

appellants, a typewritten rider was attached to the trust deed and a typewritten clause inserted in the note which materially altered the trust deed and note and which prohibits a recovery thereon. The rider attached to the trust deed is as follows: "The grantors further covenant and agree to pay the sum of $450.00 semi-annually on the principal note herein mentioned, said semi-annual payments to begin three years from the date hereof. ~~Said sums are to be applied three years from the date hereof.~~ Said sums are to be applied in the reduction of the principal sum secured hereby. It is further understood by the grantors herein that the above and foregoing covenants constitute one of the covenants and provisions of this trust deed, and that a failure so to do, or hereinbefore provided, will constitute a breach of the conditions of this trust deed. Signed Hattie A. Ohlman (Seal). Signed Percy E. Ohlman (Seal)". The clause appearing above the signatures of the makers of the note is as follows: "We promise to pay the sum of $450.00 semi-annually on this note beginning three years after the date hereof at the same place and in the same manner as above." The original answer of appellants was sworn to by Hattie A. Ohlman and it denied that appellants executed and acknowledged the note and trust deed involved in this proceeding. By their amendment to their answer filed on March 5, 1936 they averred that Abt, Nelson and appellee were all officers of the First National Bank of Antioch and that so acting they secured said note and trust deed from appellants and then, for the first time, alleged that the rider attached to the trust deed and the similar typewritten clause appearing in the note were not a part of said note or trust deed at the time the same were executed and delivered by appellants. This amendment was sworn to by appellant Percy E. Ohlman. Upon direct examination Percy Ohlman testified he never signed the rider on the trust deed. Upon cross-examination he admitted that the signature upon the rider was his signature. Mrs. Ohlman testified that she had never seen the rider upon the trust deed before the hearing and that it was not on the

trust deed when she signed the trust deed. She further testified that the signature on the rider looked like her signature but if it was her signature she did not know how it got there. S. Boyer Nelson, before whom, as a Notary Public, the trust deed was acknowledged by appellants, testified that he was acquainted with the signatures of appellants and that their signatures upon the rider attached to the trust deed are their genuine signatures. Appellee testified that the trust deed had the rider attached and that the note contained the clause referred to when they were delivered to him. Abt testified that he prepared the note and trust deed and that appellants signed them in his office, but that he had no recollection of the rider being attached to the trust deed but that the signatures thereto look like the genuine signatures of appellants. Abt further testified: "the typewriting of the trust deed looks very muck like my own typewriter, as I often times wrote out my own trust deeds when my secretary was swamped with work. I positively did not typewrite that rider. I did not typewrite into the note that which appears at the bottom of it."

The evidence is further that in July, 1932 appellants and appellee executed an extension agreement which extended the time of payment of the $7500.00 evidenced by said note of June 4, 1927 from June 4, 1932 to June 4, 1934 by the provisions of which appellants agreed to pay $110.00 on the first of each month beginning August 1, 1932 and continuing to and including April 1, 1934, and $120.00 per month from that date until the expiration of the period for which the extension was granted. A further extension agreement, dated November 8, 1934 and si gned by appellants, which recited that the balance due,was $7080.00 was offered and admitted in evidence. This last instrument was not signed by appellee and never accepted by him. Upon the question of whether the trust deed and note were altered after their execution and delivery, the special Master found

trust deed were are signed two times less. The further testifies that the signature on the rider looked like her signature but if it was her signature she did not know how it got there. Mr. Lawyer Nelson, before whom, as a Notary Public, the trust deed was acknowledged by appellants, testified that he was acquainted with the signatures of appellants and that their signatures upon the rider attached to the trust deed are their genuine signatures. Appellee testified that the trust deed and the rider attached and that the note contained the clause referred to when they were delivered to him. He testified that he prepared the note and trust deed and that appellants signed them in his office, but that he had no recollection of the rider being delivered to the trust deed but that the signatures thereto look like the genuine signatures of appellants. He further testified: "The typewriting of the trust deed looks very much like my own typewriter, as I often times wrote out my own trust deeds when my secretary was swamped with work. I positively did not typewrite that rider. I did not typewrite into the note that which appears at the bottom of it."

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against the contention of appellants. We have read the record and in our opinion the findings of the special Master upon this issue as well as upon the question of usury were justified by the evidence. The decree appealed from will therefore be affirmed.

DECREE AFFIRMED.

against the contention of appellants. We have read the record and in our opinion the findings of the special master upon this issue as well as upon the question of usury were justified by the evidence. The decree appealed from will therefore be affirmed.

(FORMAL ORDER).

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9281

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 623[4]

BE IT REMEMBERED, that afterwards, to-wit: On APR 28 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9281 Agenda No. 23

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1938.

Marvin John Prien, a minor, by
his father and next friend,
Laurence Prien,

Appellant

vs.

C. J. Wieck,

Appellee.

Appeal from the Circuit
Court of Stephenson County.

DOVE, P.J.

This cause originated in the Circuit Court of Stephenson County by Marvin John Prien, Russell West, Robert Edwin Schutt and Edwin William Strehlow, minors, by their respective fathers and next friends, filing their complaint against C. J. Wieck and William Lescord to recover damages for personal injuries which they alleged they sustained as a result of an automobile collision. The defendants filed their separate answers and counter-claims. Before the cause went to trial, a judgment by consent for $4125.00 was rendered in favor of the counter-claimant William Lescord and against Marvin John Prien. The issues made by the original complaint, the answer of the defendant C.J. Wieck, thereto, the counter-claim of C. J. Wieck and the answer thereto were submitted to a jury, resulting in a verdict finding the defendant C. J. Wieck not guilty and finding the defendant in the counter-claim Marvin John Prien guilty and assessing the damages of the counter-claimant C.J. Wieck at $800.00. Upon these verdicts appropriate judgments were rendered and to reverse the judgment against him, the original plaintiff, Marvin John Prien, has prosecuted this appeal.

The evidence discloses that on October 24, 1936 at about nine o'clock in the evening, the four plaintiffs left Monroe, Wisconsin

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APPELLATE COURT OF ILLINOIS
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his father and next friend,
Lawrence Prien,

Appellant

vs.

Appeal from the Circuit
Court of Stephenson County.

C. J. Wieck,

Appellee.

DOVE, P.J.

This cause originated in the Circuit Court of Stephenson County by Marvin John Prien, herein, next friend, Robert John Bennett and Edwin William Stretlow, minors, by their respective fathers and next friends, filing their complaint against C. J. Wieck and William Lasord to recover damages for personal injuries which they alleged they sustained as a result of an automobile collision. The defendants filed their separate answers and counter-claims. Before the cause went to trial, a judgment by consent for $125.00 was rendered in favor of the counter-claimant William Lasord and against Marvin John Prien. The issues made by the original complaint, the answer of the defendant C.J. Wieck, thereto, the counter-claim of C. J. Wieck and the answer thereto were submitted to a jury, resulting in a verdict finding the defendant C. J. Wieck not guilty and finding the defendant in the counter-claim Marvin John Prien guilty and assessing the damages of the counter-claimant C.J. Wieck at $800.00. Upon these verdicts appropriate judgments were rendered and to reverse the judgment against him, the original plaintiff, Marvin John Prien, has prosecuted this appeal.

The evidence discloses that on October 24, 1936 at about nine o'clock in the evening, the four plaintiffs left Morse, Illinois

in an automobile owned and driven by the plaintiff Marvin John Prien. Their destination was Freeport, Illinois. Russell West sat in the front seat with Prien and Strehlow and Schutt sat in the rear seat. Some three or four miles north of Freeport is the Northern Star Dance Pavilion and appellant and his companions stopped there. From the Northern Star Dance Pavilion they proceeded south along State Highway Route 74, which was a concrete pavement, twenty feet wide with a black line down the center. As appellant's car reached the crest of a hill, spoken of in the record as Snyder's Hill, the car of appellee, C.J. Wieck, was approaching from the opposite direction being driven by Wieck. According to the testimony of the accupants of the Prien automobile, appellant's car was travellin g between forty and fifty miles per hour as it reached the crest of the hill and it was at this time that some of the occupants of appellant's car first observed the automobile headlights from the Wieck car as it came toward them going in a northerly direction. At this time the Wieck car was at least two hundred and thirty-eight feet south of the Prien automobile. All of the occupants of the Prien car testified that before and at the time their car reached the top of the Snyder Hill, they were proceeding in their proper traffic lane on the west side of the black center line, that they did not know and were unable to recall what occurred after they reached the crest of the Snyder Hill. The other evidence in the case discloses that the Prien car, after passing the crest of the Snyder Hill, crossed the black center line, having left its own traffic lane, and proceeded south two hundred and thirty-eight feet at sixty-five or seventy miles per hour and hit the left rear fender of the car driven by appellee, who, before the collision and in order to avoid it, had turned his car to the right and was partially off of the paved portion of the highway when the appellant's car hit his left rear fender. After the Prien car had struck appellee's car, it continued south in the north bound traffic lane some one hundred and forty feet and struck and demolished the Lescord automobile and as a result

in an automobile owned and driven by the plaintiff Marvin John Frien. Their destination was Freeport, Illinois. Russell Kent sat in the front seat with Marvin Frien and Charlene and Robert sat in the rear seat. Some three or four miles north of Freeport is the northern Star Lake Pavilion and appellant and his companions stopped there. From the Northern Star Dance Pavilion they proceeded south along State Highway route 26, which was a concrete pavement, twenty feet wide with a black line down the center. As appellant's car reached the crest of a hill, spoken of in the record as Snyder's Hill, the car of appellee, O.J. Wisck, was approaching from the opposite direction being driven by Wisck. According to the testimony of the occupants of the Frien automobile, appellant's car was travelling between forty and fifty miles per hour as it reached the crest of the hill and it was at this time that some of the occupants of appellant's car first observed the automobile headlights from the Wisck car as it came toward them going in a northerly direction. At this time the Wisck car was at least two hundred and thirty-eight feet south of the Frien automobile. All of the occupants of the Frien car testified that before and at the time their car reached the top of the Snyder Hill, they were proceeding in their proper traffic lane on the east side of the black center line, that they did not know and were unable to recall what occurred after they reached the crest of the Snyder Hill. The other evidence in the case discloses that the Frien car, after passing the crest of the Snyder Hill, crossed the black center line, having left its own traffic lane, and proceeded south two hundred and thirty-eight feet at sixty-five or seventy miles per hour and hit the left rear fender of the car driven by appellee, who, before the collision and in order to avoid it, had turned his car to the right and was partially off of the paved portion of the highway when the appellant's car hit his left rear fender. After the Frien car had struck appellee's car, it continued south in the north bound traffic lane some one hundred and forty feet and struck and demolished the Lessard automobile and as a result

of that collision appellant and his companions were all very seriously injured. Appellee's car was not damaged very extensively and was subsequently repaired at an expense of $22.50. The evidence, however, tended to prove that as a result of the accident appellee lost ten or fifteen pounds in weight, became nervous, was unable to sleep and since the accident does not drive his automobile at night. The several occupants of the Prien automobile testified that they had never drunk any intoxicating liquor of any kind and had not been drinking on the evening in question. Helen Hasse, a resident of Monroe, Wisconsin and an acquaintance of appellant and his companions, testified that she saw them about nine o'clock upon the evening in question at the Recreation Club in Monroe and that she also saw them at the Northern Star Dance Pavilion a little later that evening, that she entered this dance pavilion about the time they left, and observed that they staggered and in her opinion they were all intoxicated.

It is insisted by counsel for appellant that there was no evidence to sustain the wilful and wanton count in the counter-claim and that the trial court therefore erred in refusing to withdraw that count from the consideration of the jury. In support of this contention counsel state that inasmuch as the evidence disclosed that appellee saw appellant's car when it was at least two hundred thirty-eight feet in front of him and that he noticed that it was wobbling and had crossed over the black line and was coming toward appellee in appellee's traffic lane, that it was the duty of appellee to immediately turn to the right and off the paved portion of the highway sufficiently to avoid the collision. The testimony of appellee was that the lights on appellant's car were burning as it came toward him, that the top of the Snyder hill was two hundred thirty-eight feet from the place where appellant's car struck appellee's car, that as appellee's car approached it was "wobbling and coming on our side of the road and at a very high rate of speed. I turned out and had my front wheels just about off the pavement and one rear wheel off the pavement when the approaching car struck my fender. * * * That car was wobbling and I turned out as quick as I could. I turned to my

of that collision appellant and his companions were all very seriously injured. Appellee's car was not damaged very extensively and was subsequently repaired at a expense of $23.50. The evidence, however, tended to prove that as a result of the accident appellee lost ten or fifteen pounds in weight, became nervous, was unable to sleep and since the accident does not drive his automobile at night. The several companions of the Prien automobile testified that they had never drunk any intoxicating liquor of any kind and had not been drinking on the evening in question. Helen Haase, a resident of Corpus, also main and an companions of appellant and his companions, testified that she saw them about nine o'clock upon the evening in question at the Recreation Club in Corpus and that she also saw them at the Northern Star Dance Pavilion a little later that evening, that she entered this dance pavilion about the time they left, and observed that they appeared and in her opinion they were all intoxicated.

It is insisted by counsel for appellant that there was no evidence to sustain the "fifth and sixth count in the counter-claim and that the trial court therefore erred in refusing to withdraw that count from the consideration of the jury. In support of this contention counsel state that inasmuch as the evidence disclosed that appellee saw appellant's car when it was at least two hundred thirty-eight feet in front of him and that he noticed that it was wobbling and had crossed over the black line and was coming toward appellee in appellee's traffic lane, that it was the duty of appellee to immediately turn to the right and off the paved portion of the highway sufficiently to avoid the collision. The testimony of appellee was that the lights on appellant's car were burning as it came toward him, that the top of the Snyder hill was two hundred thirty-eight feet from the place where appellant's car struck appellee's car, that as appellee's car approached it was "wobbling and coming on our side of the road and at a very high rate of speed. I turned out and had my front wheels just about off the pavement and one rear wheel off the pavement when the approaching car struck my fender. * * * That car was wobbling and I turned out as quick as I could. I turned to my

right as soon as I saw that car approaching." All of the evidence is that appellant's car had crossed the black center line and was travelling toward appellee's car on the wrong side of the highway. In order to account for this, counsel for appellant say the glaring headlights of appellee's car as it approached appellant's car blinded the driver and other occupants of that car. This statement is not supported by the record. Appellant did not testify that he ever saw appellee's car as it approached. He did testify that his bright lights were on as he reached the crest of Snyder's hill. "I noticed the lane that goes up to the Snyder home that night. I saw that as I came over the hill. I did not notice the scene of the accident, as I do not know where it happened. My father pointed out to me (upon appellant's return from the hospital on November 8th, 1936) where the accident took place. When my father pointed it out to me, I then recalled about the accident. *** I do not remember anything about the accident itself. I did not see another car coming toward me. I didn't see anything. All I remember is that I went over the top of the hill on my own right side of the road with my bright lights burning and that I saw the driveway that goes up to the Snyder home. The last thing I remember seeing before the collision was the road leading up to the Snyder home. From that time on, I have no recollection about the collision or about anything connected with the accident."

Counsel for appellant argue that inasmuch as the evidence discloses that from the time appellant left Monroe, Wisconsin up to the time he reached the crest of Snyder's hill, he drove his car in the proper traffic lane, that the glaring headlights of appellee's car blinded him and that he therefore found himself in a perilous position, and that in attempting to extricate himself from such position he acted as a reasonably prudent person in view of such peril and that therefore the jury were not warranted in finding him guilty of wilful and wanton misconduct. The trouble with this argument is that it is not supported by the evidence. While it is true the evidence does disclose that the headlights on appellee's car were burning, it does

right as soon as I saw that car approaching." All of the evidence is that appellant's car had crossed the black center line and was travelling toward appellee's car on the wrong side of the highway. In order to account for this, counsel for appellant say the glaring headlights of appellee's car as it approached appellant's car blinded the driver and caused a collision of both cars. This statement is not supported by the record. Appellant did not testify that he ever saw appellee's car as it approached. He did testify that his bright lights were on as he rounded the crest of Snyder's hill. "I noticed the lamp that goes up to the Snyder home last night. I saw that as I came over the hill. I did not notice the scene of the accident, as I do not know where it happened. My father pointed out to me (upon appellant's return from the hospital on November 8th, 1950) where the accident took place. When my father pointed it out to me, I then recalled about the accident. *** I do not remember anything about the accident itself. I did not see another car coming toward me. I didn't see anything. All I remember is that I went over the top of the hill on my own right side of the road with my bright lights burning and that I saw the driveway that goes up to the Snyder home. The last thing I remember seeing before the collision was the road leading up to the Snyder home. From that time on, I have no recollection about the collision or about anything connected with the accident."

Counsel for appellant argue that inasmuch as the evidence discloses that from the time appellant left Denver, Colorado up to the time he reached the crest of Snyder's hill, he drove his car in the proper traffic lane, that the glaring headlights of appellee's car blinded him and that he therefore found himself in a perilous position, and that in attempting to extricate himself from such position he acted as a reasonably prudent person in view of such peril and that therefore the jury were not warranted in finding his guilt of willful and wanton misconduct. The trouble with this argument is that it is not supported by the evidence. While it is true the evidence does disclose that the headlights on appellee's car were burning, it does

not appear that they were glaring or that they blinded appellant. Furthermore, if appellant did find himself in a perilous position it was not because of any wrongful conduct on the part of appellee. All of the evidence is that appellee was driving his car in his proper traffic lane, going along at a speed not to exceed thirty-five miles per hour, that the pavement was dry, the night clear and that the Lescord car was proceeding north and was travelling in the same traffic lane behind appellee's car, that another car occupied by Paul and James B. Ilgen was behind the Lescord car. Behind the Ilgen car, also going north, was the car driven by Donald Barmore. The occupants of these several cars all testified and from a careful consideration of all of their testimony and all the other evidence in the record, it is apparent that appellee, at the time his car was struck by appellant's car, was driving his car off of the pavement and upon the dirt shoulder of the highway in an endeavor to avoid being hit by appellant's car, which was descending the Snyder hill on the wrong side of the road in the face of oncoming traffic, at a high rate of speed estimated at between sixty-five and seventy miles per hour. Under all the evidence found in this record, we are clearly of the opinion that the trial court did not err in refusing to withdraw from the consideration of the jury the count charging appellant with wilful and wanton misconduct.

The trial court submitted to the jury the following special interrogatory: "Was the cross-defendant, Marvin John Prien, guilty of wilful and wanton misconduct in the operation of the automobile he was driving at and immediately prior to the time of the collision in question?" The jury answered this interrogatory in the affirmative. Counsel for appellant argue that it was error for the trial court to submit this special interrogatory to the jury without submitting a copy thereof to counsel before the bginning of the arguments in the case. There is no merit in this contention as the record discloses that after the evidence was concluded but before the cause was argued by counsel the court submitted to counsel for both sides the forms of the several verdicts and also this special interrogatory which the court

not appear that they were glaring or that they blinded appellant. Furthermore, if appellant did find himself in a perilous position it was not because of any wrongful conduct on the part of appellee. All of the evidence in that appellee was driving his car in his proper traffic lane, going along at a speed of a little thirty-five miles per hour, that the pavement was dry, the night clear and that the lamps of the proceeding car had not dazzled him, the same traffic line behind appellee's car, that another car occupied by Hart and Adams, light was behind the leaving car. Behind the light car, also going north, was the car driven by Howard Barnes. The occupants of these several cars all testified the from a careful consideration of all of their testimony and in the other evidence in the record, it is apparent that appellee, at the time his car was struck by appellant's car, was driving his car at the proper and upon the side thereof of the roadway in an endeavor to avoid being hit by appellant's car, which was descending the center line on the wrong side of the road in the face of approaching traffic, at a high rate of speed estimated at between sixty-five and seventy miles per hour. Under all the evidence found in this record, we are clearly of the opinion that the trial court did not err in refusing to withdraw from the consideration of the jury the cause containing appellant with willful and wanton misconduct.

The trial court submitted to the jury the following special interrogatory: "Was the cross-defendant, Harvey John Brown, guilty of willful and wanton misconduct in the operation of the automobile he was driving at and immediately prior to the time of the collision in question?" The jury answered this interrogatory in the affirmative. Counsel for appellant argue that it was error for the trial court to submit this special interrogatory to the jury without giving a copy thereof to counsel before the beginning of the argument in the cause. There is no merit in this contention as the record discloses that after the evidence was concluded but before the cause was argued by counsel the court submitted to counsel for both sides the forms of the several verdicts and also this special interrogatory which the court

subsequently submitted to the jury.

Counsel further insist that the trial court erred in giving to the jury the following two instructions: "The court instructs the jury that if you believe from a preponderance of the evidence under the instructions of the court, that the cross-defendant, Marvin John Prien, is guilty of wilful and wanton misconduct as charged in the cross-plaintiff's complaint, you should assess the cross-plaintiff's damages, if any, and in such case the jury may give exemplary damages if the jury believe the evidence warrants exemplary damages: the court further instructs you that exemplary damages are such damages as will punish the defendant for a wrong done, if any, to the plaintiff and furnish an example to deter others from like practices." "The court instructs the jury that if you find Marvin John Prien, defendant to the cross-complaint of C.J. Wieck, guilty, then in estimating the cross-plaintiff's damages, it is proper for the jury to consider the reasonable costs of the necessary repairs to the automobile of the cross-plaintiff so far as the same are shown by the evidence to have proximately resulted from the collision, and also the effect, if any, of the injury upon the cross-plaintiff's health and all such injuries, if any, as the jury may believe from a preponderance of the evidence naturally and proximately resulted therefrom to the cross-plaintiff, as well as bodily pain and nervous and physical discomfort endured by him, if any, and have considered these elements if proven, fix the plaintiff's damages at such sum as the jury may believe from the evidence, is a far and just compensation for whatever personal injury, if any, the jury may believe from the evidence, are the direct, natural and proximate result thereof."

The objection to the first of these instructions is that there is no evidence in the record from which the jury could find the appellant guilty of wilful and wanton conduct. We have already discussed the evidence and arrived at a contrary conclusion and it was therefore proper for the court to give an instruction as to exemplary damages. The objection to the second instruction is that appellee testified that he did not receive any physical injuries and that therefore it was

assessmently submitted to the jury.

Counsel further insist that the trial court erred in giving to the jury the following two instructions: "The court instructs the jury that if you believe from a preponderance of the evidence under the instructions of the court, that the cross-defendant, Irvin Irwin, is guilty of wilful and wanton misconduct as charged in the cross-plaintiff's complaint, you should assess the cross-plaintiff's damages, if any, and in such case the jury may give exemplary damages if the jury believe the evidence warrants exemplary damages; the court further instructs you that exemplary damages are such damages as will punish the defendant for a wrong done, if any, to the plaintiff and furnish an example to deter others from like practices." "The court instructs the jury that if you find Irvin Irwin, defendant to the cross-complaint of G.T. Moss, guilty, then in estimating the cross-plaintiff's damages, it is proper for the jury to consider the reasonable costs of the necessary repairs to the automobile of the cross-plaintiff so far as the same are shown by the evidence to have proximately resulted from the collision, and also the effect, if any, of the injury upon the cross-plaintiff's health and all such injuries, if any, as the jury may believe from a preponderance of the evidence naturally and proximately resulted therefrom to the cross-plaintiff, as well as bodily pain and nervous and physical discomfort endured by him, if any, and have considered these elements if proven, fix the plaintiff's damages at such sum as the jury may believe from the evidence, is a fair and just compensation for whatever personal injury, if any, the jury may believe from the evidence, are the direct, natural and proximate result thereof."

The objection to the first of these instructions is that there is no evidence in the record from which the jury could find the appellant guilty of wilful and wanton conduct. We have already discussed the evidence and arrived at a contrary conclusion and it was therefore proper for the court to give an instruction as to exemplary damages. The objection to the second instruction is that appellee testified that he did not receive any physical injuries and that therefore it was

clearly erroneous to give this instruction. Counsel do not object to the wording of this instruction, nor do they insist that it does not contain a correct proposition of law. While appellee did not testify that he suffered any bodily cuts, abrasions or lacerations as a result of this collision, still the evidence is that he did sustain a shock, that he became nervous and lost weight and appetite and has not driven a car at night since the collision. We do not believe the jury, under the evidence found in this record, could have been misled by this instruction. Furthermore, this instruction relates solely to compensatory damages and the verdict may be sustained upon the theory that the jury awarded appellee punitive damages.

It is finally insisted that the verdict cannot be sustained as compensatory damages and that if punitive damages were awarded it is excessive. We have considered all the evidence found in this record and in our opinion the jury was warranted in returning the verdict it did. We have considered the other suggestions of counsel but find no merit in them. The record is free from reversible error and the judgment will therefore be affirmed.

JUDGMENT AFFIRMED.

clearly erroneous to give this instruction. Counsel do not object to the wording of this instruction, nor do they insist that it does not contain a correct proposition of law. While appellee did not testify that he suffered any bodily ill, [illegible] as a result of this collision, still the evidence is that he did sustain a shock, that he became nervous and lost weight and appetite and has not driven a car at night since the collision. We do not believe the jury, under the evidence found in this record, could have been misled by this instruction. Furthermore, this instruction relates solely to compensatory damages and the verdict may be sustained upon the theory that the jury returned nominal punitive damages.

It is finally insisted that the verdict cannot be sustained as compensatory damages and that if punitive damages were awarded it is excessive. We have considered all the evidence found in this record and in our opinion the jury was warranted in returning the verdict it did. We have considered the other suggestions of counsel but find no merit in them. The record is free from reversible error and the judgment will therefore be affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On APR 28 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9282 Agenda No. 12

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1938.

54A

Daniel Faust and Byrda Abbott,

Appellants

vs.

Bartholomaus S. Steidinger, et al.,

Appellees.

Appeal from the Circuit Court Livingston County.

HUFFMAN - J.

This was a suit by appellants, as judgment creditors, to set aside an alleged fraudulent conveyance of 160 acres of land in Livingston County, by Bartholomaus S. Steidinger and Leah, his wife, to their children. The deed was executed, delivered and recorded on December 9, 1930. Appellants obtained their judgments against Mr. Steidinger in the months of July and August, 1931, upon notes which were secured by a first mortgage on 444 acres of land in Mercer county. The total mortgage indebtedness upon this land was $30,000, a portion of which is represented by the notes held by appellants.

The cause was referred to a Special Master, who found that the conveyance of the 160 acre tract was fraudulent as to appellants and should be set aside, except as to the sum of $10,500, which amount had been advanced by Mrs. Steidinger's father toward the purchase of the tract, with the express understanding and agreement that the same should be charged with a trust in favor of the children of Mr. and Mrs. Steidinger, who are the grantees in the above deed. The Master recommended a decree setting aside the deed, authorizing sale of the premises, subject to a first lien in favor of the children of Mr. and Mrs. Steidinger in the sum of $10,500, and with a homestead

Gen. No. 9282 Agenda No. 12

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1931.

Daniel Frost and Byrda Abbott,

Appellants

va.

Bartholomaus S. Steidinger, et al.,

Appellees.

Appeal from the Circuit Court Livingston County.

HUTCHINSON - J.

This was a suit by appellants, as judgment creditors, to set aside an alleged fraudulent conveyance of 160 acres of land in Livingston County, by Bartholomaus S. Steidinger and Sarah, his wife, to their children. The deed was executed, delivered and recorded on December 9, 1920. Appellants obtained their judgments against Mr. Steidinger in the months of July and August, 1921, upon notes which were secured by a first mortgage on 444 acres of land in another county. The total mortgage indebtedness upon this land was $30,000, a portion of which is represented by the notes held by appellants.

The cause was referred to a Special Master, who found that the conveyance of the 160 acre tract was fraudulent as to appellants and should be set aside, except as to the sum of $10,500, which amount had been advanced by Mrs. Steidinger's father toward the purchase of the tract, with the express understanding and agreement that the same should be charged with a trust in favor of the children of Mr. and Mrs. Steidinger, who are the grantees in the above deed. The Master recommended a decree setting aside the deed, authorizing sale of the premises, subject to a first lien in favor of the children of Mr. and Mrs. Steidinger in the sum of $10,500, and with a homestead

right reserved to the grantors in the sum of $1000. Objections to the Master's report were overruled and permitted to stand as exceptions in the trial court. The Chancellor sustained appellee's exceptions and found that the mortgage notes upon which appellants had taken their judgments, were amply secured by the first mortgage on the 444 acres of land in Mercer county; that at the time of the filing of the complaint herein, the reasonable worth of that land was $33,300; that at the time of the conveyance of the 160 acre tract, Steidinger was seized and possessed of unencumbered real estate subject to levy and sale; that he was not insolvent at the time he made the deed to said tract; that the conveyance was not made with the intent to defraud appellants or other creditors and did not in fact hinder and delay appellants or other creditors; that the money used to purchase and improve said premises was furnished by Mrs. Steidinger's father, who charged same with a trust in favor of the Steidinger children, and that the conveyance was made in good faith and in compliance with the trust imposed. The court found the equities with the defendants (appellees herein), and dismissed the bill at cost of the complainants. From this decree appellants prosecute this appeal.

The testimony taken before the Master consists of approximately two hundred pages, which renders it impracticable to enter into any discussion of the same here. However, on the part of appellants it was confined largely to a question of the solvency of Mr.Steidinger at the time he executed the deed to his children. The evidence on the part of appellees also deals mainly with this question. Appellants rely upon the rule as announced in Birney v. Solomon, 348 Ill. 410, 414, and Wright V. Risser, 290 Ill. App. 576, 584, to the effect that the validity of a voluntary conveyance as against creditors is to be determined by the question whether it directly tends to impair the rights of creditors, and that it is of no moment that property remaining in the grantor's hands after such conveyance has a nominal value in excess of the amount of his indebtedness, if subsequent events

right reserved to the grantors in the sum of $1000. Objections to the Master's report were overruled and permitted to stand as exceptions in the trial court. The Chancellor sustained appellee's exceptions and found that the mortgage notes upon which appellants had taken their judgments, were simply secured by the first mortgage on the 444 acres of land in Vercer county; that at the time of the filing of the complaint herein, the reasonable worth of that land was $35,500; that at the time of the conveyance of the 160 acre tract, Steidinger was seized and possessed of unencumbered real estate subject to levy and sale; that he was not insolvent at the time he made the deed to said trust; that the conveyance was not made with the intent to defraud appellants or other creditors and did not in fact hinder and delay appellants or other creditors; that the money used to purchase and improve said premises was furnished by Mrs. Steidinger's father, who charged same with a trust in favor of the Steidinger children, and that the conveyance was made in good faith and in compliance with the trust imposed. The court found the equities with the defendants (appellees herein), and dismissed the bill at cost of the complainants. From this decree appellants prosecute this appeal.

The testimony taken before the Master consists of approximately two hundred pages, which renders it impracticable to enter into any discussion of the same here. However, on the part of appellants it was confined largely to a question of the solvency of Mr. Steidinger at the time he executed the deed to his children. The evidence on the part of appellees also deals mainly with this question. Appellants rely upon the rule as announced in Birney v. Solomon, 348 Ill. 410, 414, and Wright V. Risser, 290 Ill. Pp. 376, 384, to the effect that the validity of a voluntary conveyance as against creditors is to be determined by the question whether it directly tends to impair the rights of creditors, and that it is of no moment that property remaining in the grantor's hands after such conveyance has a nominal value in excess of the amount of his indebtedness, if subsequent events

show that the property so remaining in his hands was insufficient to discharge his liabilities. The evidence discloses that Mr. Steidinger for a period of years had dealt extensively in the purchase and sale of farm lands. It appears that he made sales of lands ranging in price from $270 to $170 per acre. The 444 acre tract located in Mercer county, upon which the appellants held mortgage notes, was traded by Mr. Steidinger to Eugene Welcher of Peoria, who assumed payment of the mortgage thereon as part of the purchase price. In this transaction it appears that Steidinger sold this land at the price of $150 per acre, receiving a business property in Peoria at the figure of $39,000, and inthe transaction paid to Mr. Welcher the sum of $3500 in cash. The Peoria property was then under mortgage in the amount of $19,000, which Steidinger claims he reduced to the extent of about $5000. In addition to this, it appears that he owned city property which was unencumbered, consisting of a nine room dwelling house and city lots which he values at $3500.

Although fraud is generally not presumed, yet the relationship of the parties to a transaction such as exists herein is a circumstance to excite suspicion. Under the rule in this state, proof of actual insolvency in order to render a voluntary conveyance void, especially when made between husband and wife, or parents and children, is not required, and where one is found to be insolvent after having ~~much~~ made such a conveyance, the burden of dispelling the implication of fraud as against pre-existing creditors, is upon the grantee. However, if it appears that the debtor did retain in his possession property sufficient to discharge his debts existing at the time of making the conveyance, then the presumptive evidence of a fraudulent intent is overcome. As stated in the case of State Bank of Clinton v. Barnett, 250 Ill. 312, at p. 318, "if this was not permitted, trade of every description would be very much crippled, and instead of there being an active inter-change of property, the whole business of the country would stagnate." The owner of property may give the same to anyone he chooses so long as he thereby injures no existing creditor. And the fact that he may be indebted is not of itself sufficient to render the

show that the property so remaining in his hands was insufficient to discharge his liabilities. The evidence discloses that Mr. Steidinger for a period of years had dealt extensively in the purchase and sale of farm lands. It appears that he sold lands of farmers ranging in price from $70 to $170 per acre. The land involved located in Lerner county, upon which the appellants held mortgage notes, was traded by Mr. Steidinger to Dwane Melcher of Peoria, who assumed payment of the mortgage thereon as part of the purchase price. In this transaction it appears that Steidinger sold this land at the price of $150 per acre, receiving a bankrupt property in Peoria at the figure of $8,000, and in the transaction paid to Mr. Melcher the sum of $3500 in cash. The Peoria property was then under mortgage in the amount of $19,000, which Steidinger claims he reduced to the extent of about $5000. In addition to this, it appears that he owned city property which was unencumbered, consisting of a nine room dwelling house and city lots which he values at $3500.

Although fraud is generally not presumed, yet the relationship of the parties to a transaction such as exists herein is a circumstance to excite suspicion. Under the rule in this state, proof of actual insolvency in order to render a voluntary conveyance void, especially when made between husband and wife, or parents and children, is not required, and where one is found to be insolvent after having made such a conveyance, the burden of dispelling the implication of fraud as against pre-existing creditors, is upon the grantee. However, it it appears that the debtor did retain in his possession property sufficient to discharge his debts existing at the time of making the conveyance, then the presumptive evidence of a fraudulent intent is overcome. As stated in the case of State Bank of Clinton v. Barnett, 230 Ill. 312, at p. 318, "If this was not permitted, trade of every description would be very much crippled, and instead of there being an active inter-change of property, the whole business of the country would stagnate." The owner of property may give the same to anyone he chooses so long as he thereby injures no existing creditor. And the fact that he may be indebted is not of itself sufficient to render the

gift inoperative, if it appears that at the time he is solvent.

The evidence discloses that the 160 acre tract in question was encumbered by a $16000 mortgage; that $10,500 in cash was advanced by Mrs. Steidinger's father, and that she further received $18,500 from the sale of an 80 acre tract given her by her father, which funds appellees claim were used to discharge the mortgage on the 160 acre tract and to improve the same with buildings. It is also claimed by appellees that the money so advanced by Mrs. Steidinger's father was based upon the consideration that the title to said land should be held in trust by them for and on behalf of their children.

The value of the land mortgaged as security for appellant's notes, and the appellees' financial responsibility at the time of execution of the deed to their children, were questions of fact. Also were the questions regarding the advancement of sufficient funds by Mrs. Steidinger's father to purchase the land and the conditions under which the same were advanced. The trial court resolved these questions in favor of appellees.

The testimony in this case was extended and involved. Appellees urge that before this court would be justified in reversing the decree on the ground it is not supported by the evidence, it must be able to say the decree is clearly against the weight of the evidence. We do not understand this to be the rule except in cases where the witnesses are produced and examined in open court before the Chancellor hearing the case. Union Bank of Chicago v. Gallup, 317 Ill. 184, 187; Oliver v. Ross, 289 Ill. 624, 637; Stasch v. Stasch, 355 Ill. 581, 583, 584.

From a review of the record we are of the opinion that the evidence ~~tends to~~ supports the finding of the trial court, and we are not disposed to interfere with that conclusion.

The decree of the Circuit Court of Livingston County is affirmed.

Decree affirmed.

suit inoperative, if it appears that at the time he is solvent.

The evidence discloses that the 160 acre tract in question was encumbered by a $1,000 mortgage; that $10,000 in cash was advanced by Mrs. Steidinger's father, and that she further received $12,500 from the sale of an 80 acre tract given her by her father, which funds appellees claim were used to discharge the mortgage on the 160 acre tract and to improve the same with buildings. It is also claimed by appellees that the money so advanced by Mrs. Steidinger's father was based upon the consideration that the title to said land should be held in trust by that for and on behalf of their children.

The value of the land mortgaged as security for appellant's notes, and the appellees' financial responsibility at the time of execution of the deed to their children, were questions of fact. Also were the questions regarding the advancement of sufficient funds by Mrs. Steidinger's father to purchase the land and the conditions under which the same were advanced. The trial court resolved these questions in favor of appellees.

The testimony in this case was conflicting and involved. Appellees urge that before this court would be justified in reversing the decree on the ground it is not supported by the evidence, it must be able to say the decree is clearly against the weight of the evidence. We do not understand this to be the rule except in cases where the witnesses are produced and examined in open court before the Chancellor trying the case. Union Bank of Chicago v. Dailey, 317 Ill. 184, 187; Oliver v. Rose, 287 Ill. 624, 627; Stauch v. Stauch, 365 Ill. 571, 583, 584.

From a review of the record we are of the opinion that the evidence tends to support the finding of the trial court, and we are not disposed to interfere with that conclusion.

The decree of the Circuit Court of Livingston County is affirmed.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: On APR 28 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

General No. 9278 Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1938.

324

Fred Burren,

Plaintiff and Appellant

vs.

Albert W. Koch,

Defendant and Appellee.

Appeal from the Circuit Court of Boone County.

WOLFE, J.

Fred Burren, appellant, started an action of forcible entry and detainer against Albert W. Koch, defendant, in the Circuit Court of Boone County, seeking possession of certain farm land in Boone County. The petition alleges that the defendant entered into the possession of the premises in question under a certain lease which had expired on February 28, 1937. It also alleges that a sixty days' notice had been given by the plaintiff to the defendant to surrender up the premises at the expiration of the lease. The plaintiff alleges he is entitled to the possession of the premises. The defendant filed his answer in which he admits that he entered into the lease in question, but denies that he went into possession of said premises under said lease. He avers he was in possession of the same under a contract of purchase from the plaintiff to the defendant at the time the lease in question was executed; that he had complied with the terms of the contract for a deed and tendered the money and demanded a deed from the plaintiff, but that the plaintiff refused to execute a deed as provided in the contract. To this answer the plaintiff filed a replication and denied that the defendant had tendered the amount due under the contract, and denied that the plaintiff had refused to execute a deed to the defendant.

The case was tried before the court without a jury. The court found the issues in favor of the defendant and dismissed the suit at

General No. 9278 Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1928.

Fred Burren,
Plaintiff and Appellant

vs.

Albert W. Koch,
Defendant and Appellee.

Appeal from the Circuit
Court of Boone County.

WOLFE, J.

Fred Burren, appellant, started an action of forcible entry and detainer against Albert W. Koch, defendant, in the Circuit Court of Boone County, seeking possession of certain farm land in Boone County. The petition alleges that the defendant entered into the possession of the premises in question under a certain lease which had expired on February 28, 1927. It also alleges that a sixty days' notice had been given by the plaintiff to the defendant to surrender up the premises at the expiration of the lease. The plaintiff alleges he is entitled to the possession of the premises. The defendant filed his answer in which he admits that he entered into the lease in question, but denies that he went into possession of said premises under said lease. He avers he was in possession of the same under a contract of purchase from the plaintiff to the defendant at the time the lease in question was executed; that he had complied with the terms of the contract for a deed and tendered the money and demanded a deed from the plaintiff, but that the plaintiff refused to execute a deed as provided in the contract. To this answer the plaintiff filed a replication and denied that the defendant had tendered the amount due under the contract, and denied that the plaintiff had refused to execute a deed to the defendant.

The case was tried before the court without a jury. The court found the issues in favor of the defendant and dismissed the suit at

plaintiff's cost. It is from this judgment that this appeal is prosecuted.

On January 22, 1938, the appellee filed a motion to dismiss the appeal. This motion is supported by an affidavit in which the defendant states that the cause of action has been settled and there is nothing for this court to pass upon. The appellant has filed a counter-affidavit denying that the cause of action has been settled and has entered a motion to strike the motion of appellee. These motions were taken with the case, and after due consideration the motion to dismiss and the motion to strike are hereby denied.

On January 29, 1938, the appellant entered a motion to expunge from the record defendant's Exhibits Nos. 1, 2, 3, 4, 5, 6 and 7, because said Exhibits were not admitted in evidence at the trial of the case on August 3, 1937, but were admitted more than thirty days after judgment was taken and rendered in said cause, when the record was presented to the presiding judge for his certification. This motion is supported by affidavit of one of the attorneys for the appellant. The appellee filed an affidavit in opposition to said motion. The attorneys for appellant and appellee differed materially as to what was said and done in the Trial Court at the time the record was presented to him to be certified. The record itself shows that the plaintiff's Exhibits Nos. 1, 2 and 3, were admitted in evidence, and the defendant's Exhibits Nos. 1, 2, 3, 4, 5, 6 and 7, were also admitted in evidence. The record also shows an exception by the plaintiff, and also shows a motion was made by the defendant asking leave to withdraw the Exhibits given by the defendant and to substitute copies therefor. After this was done plaintiff's attorneys examined the plaintiff on re-direct examination, and then re-cross examination by the attorneys for the defendant.

The Trial Court certified the record as correct. The record that was presented by the attorneys for the plaintiff bears the O. K. of the attorney for the defendant. In a review of the record as it now stands, this court will have to consider that the same is correct and that the Exhibits were admitted in evidence as the records show.

plaintiff's case. It is from this judgment that this appeal is prosecuted.

On January 22, 1930, the appellee filed a motion to dismiss the appeal. This motion is supported by an affidavit in which the defendant states that the cause of action has been settled and there is nothing for this court to pass upon. The appellant has filed a counter-affidavit denying that the cause of action has been settled and has entered a motion to strike the motion of appellee. These motions were taken with the case, and after due consideration the motion to dismiss and the motion to strike are hereby denied.

On January 29, 1930, the appellant entered a motion to expunge from the record defendant's Exhibits Nos. 1, 2, 3, 4, 5, 6 and 7, because said Exhibits were not admitted in evidence at the trial of the case on August 3, 1927, but were admitted more than thirty days after judgment was taken and rendered in said cause, when the record was presented to the presiding judge for his certification. This motion is supported by affidavit of one of the attorneys for the appellant. The appellee filed an affidavit in opposition to said motion. The attorneys for appellant and appellee differed materially as to what was said and done in the Trial Court at the time the record was presented to him to be certified. The record itself shows that the plaintiff's Exhibits Nos. 1, 2 and 3, were admitted in evidence, and the defendant's Exhibits Nos. 1, 2, 3, 4, 5, 6 and 7, were also admitted in evidence. The record also shows an exception by the plaintiff, and also shows a motion was made by the defendant asking leave to withdraw the Exhibits given by the defendant and substitute copies therefor. After this was done plaintiff's attorneys examined the plaintiff on re-direct examination, and then re-cross examination by the attorneys for the defendant.

The Trial Court certified the record as correct. The record that was presented by the attorneys for the plaintiff bear the O. K. of the attorney for the defendant. In a review of the record as it now stands, this court will have to consider that the same is correct and that the Exhibits were admitted in evidence as the records show.

The motion to expunge the Exhibits of the defendant from the record is hereby denied.

The plaintiff, being called as a witness on his own behalf, testified that he was the owner of the property in question; that he and Albert W. Koch had entered into a lease which is identified as Plaintiff's Exhibit No. 3; that the lease had expired; that he had served a written notice on the defendant demanding possession of the farm at the termination of the lease; that he had also served a landlord's five days' notice demanding of the defendant the sum of $291.66 as rent for the premises.

The defendant then cross-examined the plaintiff. Mr. Burren identified each of defendant's Exhibits, Nos. 1, 2, 3, 4, 5, 6, and 8, and admitted that defendant's Exhibit No. 7, which is the contract for the sale of the land in question, was executed by Mr. and Mrs. Albert W. Koch, and also admitted that at the time the lease in question was made, Mr. Koch was in possession of the premises under a contract for deed. The lease expressly provides that: "It is further stipulated and agreed by and between the parties hereto that the signing and executing of this lease by the said party of the second part, shall not in any way, constitute or be considered a waiver, release, or relinguishment of any right, title, or interest he may have in an undivided one-half of said above described premises, by virtue of any written contracts heretofore entered into between said parties relative thereto, or otherwise."

The case of the State Bank of St.Charles vs. James H. Burr, 283 Ill. App. 337, in which the Bank of St.Charles brought a suit of forcible entry and detainer against James H. Burr, the facts were similar to the case we are now considering, and the court held: "In an action of forcible entry and detainer wherein it appeared that besides a lease there had also been executed a deed of the premises and an option to re-purchase upon payment of money secured by trust deed and notes, held that the lease, deed and option should be construed together to ascertain the intent of parties, and that so construed the transaction should be held to be a mortgage, and there-

The motion to expunge the Exhibits of the defendant from the record is hereby denied.

The plaintiff, being called as a witness on his own behalf, testified that he was the owner of the property in question; that he and Albert W. Hook had entered into a lease which is identified as Plaintiff's exhibit No. 2; that the lease had expired; that he had served a written notice on the defendant demanding possession of the farm at the termination of the lease; that he had also served a landlord's five days' notice demanding of the defendant the sum of $291.66 as rent for the premises.

The defendant then cross-examined the plaintiff. Mr. Burrer identified each of defendant's Exhibits, Nos. 1, 2, 3, 4, 5, 6, and 8, and admitted that defendant's Exhibit No. 7, which is the contract for the sale of the land in question, was executed by Mr. and Mrs. Albert W. Hook, and also admitted that at the time the lease in question was made, Mr. Hook was in possession of the premises under a contract for deed. The lease expressly provides that: "It is further stipulated and agreed by and between the parties hereto that the signing and executing of this lease by the said party of the second part, shall not in any way, constitute or be considered a waiver, release, or relinquishment of any right, title, or interest he may have in an undivided one-half of said above described premises, by virtue of any written contracts heretofore entered into between said parties relative thereto, or otherwise."

The case of the State Bank of St.Charles vs. James H. Burr, 285 Ill. App. 397, in which the Bank of St.Charles brought a suit of forcible entry and detainer against James H. Burr, the facts were similar to the case we are now considering, and the court held: "In an action of forcible entry and detainer wherein it appeared that besides a lease there had also been executed a deed of the premises and an option to re-purchase upon payment of money secured by trust deed and notes, held that the lease, deed and option should be construed together to ascertain the intent of parties, and that so construed the transaction should be held to be a mortgage, and there-

fore an action of forcible entry and detainer was not maintainable."

In the present case, the defendant Koch was in possession of the premises as owner of a one-half interest in the farm. He deeded the same to the appellant, Burren, who thereupon executed a contract of sale to Koch for the premises. Later Koch entered into a lease of the premises to Burren, and expressly provided that it was made subject to the contract of sale. Under these circumstances it is our conclusion that these instruments should be considered together, and when so considered it does not show that the appellee, Koch, held the premises under a lease as claimed by Burren, and that the appellant cannot maintain his suit of forcible entry and detainer.

The judgment of the Trial Court is hereby affirmed.

Judgment Affirmed.

fore an action of forcible entry and detainer was not maintainable."

In the present case, the defendant Koch was in possession of the premises as owner of a one-half interest in the farm. He dealt the same to the appellant, Burren, who thereupon executed a contract of sale to Koch for the premises. Later Koch entered into a lease of the premises to Burren, and expressly provided that it was made subject to the contract of sale. Under these circumstances it is our conclusion that these instruments should be considered together, and when so considered it does not show that the appellee, Koch, held the premises under a lease as claimed by Burren, and that the appellant cannot maintain his suit of forcible entry and detainer.

The judgment of the Trial Court is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

1v9v

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: On APR 28 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9292 Agenda No. 15

In the Appellate Court of Illinois

Second District

February Term, A. D. 1938

Marr, Green and Company,
a corporation,
Appellee,

vs.

Village of Grays Lake,
a Municipal Corporation,
Appellant,

Appeal from the Circuit Court
of Lake County

534

WOLFE, J.

On April 6, 1932, Marr, Green & Company, a corporation, started suit in the circuit court of Lake County against the Village of Grays Lake, a municipal corporation, for the collection of money alleged to be due the plaintiff for certain engineering services for local improvements under the Local Improvement Laws of the State of Illinois. The declaration is in two counts: The first count declares upon a written contract of date May 13, 1925. The second count the old common counts. The declaration is supported by an affidavit for the amount due. The defendant filed a plea of general denial and attached an affidavit of meritorious defense. The case was heard by the court without a jury on a stipulation of facts.

In substance the stipulation shows the following: In the years 1925, 1926 and 1927, the plaintiff was an engineering corporation having an office in Chicago, Illinois, with Paul E. Green acting as its president. The defendant during that time was, and is now, a village incorporated under the General Laws of the State of Illinois. The defendant desiring to construct a system of paving entered into a contract with the plaintiff on May 13, 1925, by

Gen. No. 9202 Agenda No. 13

In the Appellate Court of Illinois

Second District

February Term, A. D. 1932

Hart, Green and Company,
a corporation,
Appellee,

vs.

Village of Grays Lake,
a Municipal Corporation,
Appellant,

Appeal from the Circuit Court
of Lake County

VOLKER, J.

On April 6, 1932, Hart, Green & Company, a corporation, started suit in the circuit court of Lake County against the Village of Grays Lake, a municipal corporation, for the collection of money alleged to be due the plaintiff for certain engineering services for local improvements under the Local Improvement Laws of the State of Illinois. The declaration is in two counts: The first count declares upon a written contract of date May 13, 1925. The second count the old common counts. The declaration is supported by an affidavit for the amount due. The defendant filed a plea of general denial and attached an affidavit of meritorious defense. The case was heard by the court without a jury on a stipulation of facts.

In substance the stipulation shows the following: In the years 1925, 1926 and 1927, the plaintiff was an engineering corporation having an office in Chicago, Illinois, with Paul L. Green acting as its president. The defendant during that time was, and is now, a village incorporated under the General Laws of the State of Illinois. The defendant desiring to construct a system of drainage entered into a contract with the plaintiff on May 13, 1925, by

which the plaintiff agreed to perform all necessary engineering work for such improvements, and the defendant agreed to pay plaintiff for such work at a stipulated price. The contract called for several different pavements, which were not to be constructed by the village as a whole. It was divided into separate units, as different parts of the village were involved. Improvements numbered 18, 19, 20, 21 and 22, are not involved in this suit. These improvements had been completed, or were in process of completion when three additional improvements, numbers 23, 24 and 25 were contemplated and planned on September 7, 1926.

On that date the Board of Trustees of said city directed the Village Clerk to instruct the plaintiffs to prepare plans, etc., for the paving of these streets in the village. The plaintiffs proceeded to do so and for that purpose designed three additional improvements, numbered 23, 24 and 25, the ones in issue in this suit. They prepared a resolution for making such improvements by special assessment proceedings, such plans, resolution, etc., being duly submitted by the engineers to the Board of Local Improvements of said village. Public hearings were called and held thereon as provided by law. The cost of these three improvements as estimated by the engineers was $140,600.00.

The Board of Local Improvements of said City adopted a resolution in each case, for making such improvements, and held public hearings as provided by the Local Improvement Act. At these public hearings objections to making such improvements were filed by many property owners affected thereby. The Board adjourned the hearing on ~~fxix~~ said objections from December 9th to December 14, 1926. At such adjourned hearing further objections were made by interested property owners, and further action on said resolution was postponed to March 15, 1927. No further action was taken by said village.

On April 4, 1927, the plaintiff, Marr, Green & Company, presented to the Board of Trustees of the Village of Grays Lake a

which the plaintiff agreed to perform all necessary engineering work for such improvements, and the defendant agreed to pay plaintiff for such work at a stipulated price. The contract called for several different pavements, which were not to be constructed by the village as a whole. It was divided into separate units, as different parts of the village were involved. Improvements numbered 18, 19, 20, 21 and 22, are not involved in this suit. These improvements had been completed, or were in process of completion when three additional improvements, numbers 23, 24 and 25 were contemplated and planned on September 7, 1926.

On that date the Board of Trustees of said city directed the village Clerk to instruct the plaintiffs to prepare plans, etc., for the paving of these streets in the village. The plaintiffs proceeded to do so and for that purpose designed three additional improvements, numbered 23, 24 and 25, the ones in issue in this suit. They prepared a resolution for making such improvements by special assessment proceedings, such plans, resolution, etc., being duly submitted by the engineers to the Board of Local Improvements of said village. Public hearings were called and held thereon as provided by law. The cost of these three improvements as estimated by the engineers was $140,500.00.

The Board of Local Improvements of said City adopted a resolution in each case, for making such improvements, and held public hearings as provided by the Local Improvement Act. At those public hearings objections to making such improvements were filed by many property owners affected thereby. The Board adjourned the hearing on ~~Lwkx~~ said objections from December 8th to December 1, 1926. At such adjourned hearing further objections were made by interested property owners, and further action on said resolution was postponed to March 15, 1927. No further action was taken by said village.

On April 4, 1927, the plaintiff, Mart, Green & Company, presented to the Board of Trustees of the Village of Crystal Lake a

bill for their services in making the preliminary plans, estimates, etc., for the sum of $1406.00, the same being computed at the rate as provided in the written contract. On the same day the bill was allowed by the Board of Trustees of defendant village. At the hearing of said cause the court found the issues in favor of the plaintiff and against the defendant and entered judgment in favor of the plaintiff for the sum of $1406.00, and assessed the cost of suit against the defendant. To reverse this judgment the Village of Grays Lake has appealed the case to this court.

The appellants, in their brief, state their theory of the case to be as follows: "(1) That the contract declared on is void, for the reason that it created a debt, an obligation, an expense to be paid from the general funds of the village for which no appropriation had been previously made, in violation of Sections III and IV of Article 7 of the Cities and Villages Act. (2) That the Board of Trustees had no power to create such obligation, either directly or in the alternative. (3) That the Board of Trustees had no power to obligate itself either to pass an ordinance providing for the making of a local improvement, and creating a special fund against which lawfully issued interest bearing certificates might be drawn to pay the plaintiff, or in the alternative, to pay the plaintiff from the general funds of said village for work done in case it elected to abandon the improvements unless an appropriation of such funds had been previously made for such purpose."

In the case of Anderson v. The City of Highland Park, 276 Ill. App. 327, similar questions were involved, and on page 338 of said opinion we said: "A municipal corporation may be estapped by its own conduct. The rule is that a city may be estopped to set up the defense that its contract was not made in compliance with the form and method prescribed by law if the city had accepted the benefits of the contract as executed by the other party thereto, if the contract is not ultra vires of the city nor prohibited by law. A city is liable for the costs and expenses of preparing

bill for their services in making the preliminary plans, estimates, etc., for the sum of $1400.00, the same being computed at the rate as provided for in the written contract. On the same day the bill was allowed by the board of Trustees of defendant village. At the hearing of said cause the court found the issues in favor of the plaintiff and against the defendant and entered judgment in favor of the plaintiff for the sum of $1400.00, and assessed the costs of suit against the defendant. To reverse this judgment the village of Grays Lake has appealed the case to this court.

The appellants, in their brief, state their theory of the case to be as follows: "(1) That the contract declared on is void, for the reason that it created a debt, an obligation, an expense to be paid from the general funds of the village for which no appropriation had been previously made, in violation of sections III and IV of Article V of the Cities and Villages Act. (2) That the Board of Trustees had no power to create such obligation, either directly or in the alternative. (3) That the Board of Trustees had no power to obligate itself either to pass an ordinance providing for the making of a local improvement, and creating a special fund against which lawfully issued interest bearing certificates might be drawn to pay the plaintiff, or in the alternative, to pay the plaintiff from the general funds of said village for work done in case it elected to abandon the improvement, unless an appropriation of such funds had been previously made for such purpose."

In the case of Anderson v. The City of Highland Park, 272 Ill. App.327, similar questions were involved, and on page 333 of said opinion we said: "A municipal corporation may be estopped by its own conduct. The rule is that a city may be estopped to set up the defense that its contract was not made in compliance with the form and method prescribed by law if the city had accepted the benefits of the contract as executed by the other party thereto, if the contract is not ultra vires of the city nor prohibited by law. A city is liable for the costs and expenses of [illegible]

a local improvement. The design and effect of the ordinances of the City of Highland Park requiring its contracts to be in writing the Aye and Nay shall be taken on any motion or resolution voted on by the city council and that all ordinances and resolutions appropriating money shall remain on file for one week with the city clerk for public inspection, is to define the mode of the execution of express contracts with the city. In the case of Chicago vs. Pittsburg, C. C. & St. L. Ry. Co., 244 Ill. 220, it is said: 'A city is not entirely exempt from all the rules of honesty and fair dealing that are applicable to individuals and private corporations. If a city may lawfully exercise a power, it may be equitably estopped to question the validity of its exercise on account of the manner in which it is done or the lack ofrequired formalities, as right and justice require.' The provisions of the ordinances are not a limitation on the power of the city contained in its charter. Having accepted the benefits of the work of the plaintiff, it would be inequitable and unjust to permit the defendant to defeat the claim of the plaintiff by relying on the ordinances."

The same questions were presented to the Supreme Court in the case of Bunge v. Downers Grove Sanitary District, 356 Ill. 531. On page 537 of said opinion we find the following: "Defendant contends that it is not liable because the contracts were contingent upon completion of the improvements. It has been repeatedly held by the court that where a special assessment proceeding is not carried to completion, either because of the invalidity of the ordinance or because it is dismissed before confirmation, the municipality cannot avoid payment by setting up the contingent nature of the contract but is liable out of the general fund. Defendant having repudiated its contracts with plaintiffs, they were entitled to treat the contracts as rescinded and recover upon quantum meruit so far as they had performed. The contracts with plaintiffs having been repudiated, the fact that proceedings

a local improvement. The design and effect of the ordinance of the City of Highland Park requiring its contracts to be in writing the ye and nay shall be taken on any motion or resolution voted on by the city council and that all ordinances and resolutions appropriating money shall remain on file for one week with the city clerk for public inspection, is to define the mode of the exception of express contracts with the city. In the case of Ohlweg vs. Fischbeck, 3. N. E. R. I. Ry. Co., 244 Ill. 320, it is said: 'A city is not entirely exempt from all the rules of honesty and fair dealing that are applicable to individuals and private corporations. If a city may lawfully exercise a power, it may be equitably stopped to question the validity of the exercise on account of the manner in which it is done or the lack of formalities, as fair and justice requires.' The provisions of the ordinances are not a limitation on the power of the city contained in its charter. Having accepted the benefits of the work of the plaintiff, it would be inequitable and unjust to permit the defendant to defeat the claim of the plaintiff by relying on the ordinances.

The same questions were presented to the Supreme Court in the case of Gage v. Downers Grove Sanitary District, 368 Ill. 321. On page 327 of said opinion we find the following: "Defendant contends that it is not liable because the contracts were contingent upon completion of the improvements. It has been repeatedly held by the courts that where a special assessment proceeding is not carried to conclusion, either because of the invalidity of the ordinance or because it is dismissed before confirmation, the municipality cannot avoid payment by setting up the contingent nature of the contract but is liable out of the general fund. Defendant having repudiated its contracts with plaintiffs, they were entitled to treat the contracts as rescinded and recover upon quantum meruit so far as they had performed. The contracts with plaintiffs having been repudiated, the fact that proceedings

Nos. 26 and 28 were not dismissed of record is no defense to the action.

"The basis of the action as limited by the bill of particulars was not upon the contracts for services under proceedings Nos. 26, 27 and 28, but upon quantum meruit because of defendant's repudiation of the contracts. That being the issue, the trial court did not err in admitting testimony as to the value of such services."

It is our conclusion that the law as set forth in these two opinions fully covers the issues as presented in this appeal, and the trial court properly rendered judgment in favor of the appellee. The judgment of the circuit court is hereby affirmed.

Judgment Affirmed.

Nos. 24 and 25 were not dismissed of record in reference to the action.

"The basis of the action as limited by the bill of particulars was not upon the contracts for services under proceedings Nos. 24, 27 and 28, but upon quantum meruit because of defendant's repudiation of the contracts. Just being the issue, the trial court did not err in admitting testimony as to the value of such services."

It is our conclusion that the law as set forth in these two opinions fully covers the issues as presented in this appeal, and the trial court properly rendered judgment in favor of the appellee. The judgment of the circuit court is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

9733

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

295 I.A. 624[3]

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

General No. 9233. Agenda No. 19.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1938

341

MARTIN VERNA, Administrator of the Estate of PETER VERNA, Deceased, Plaintiff--Appellee, vs. IRENE MOFFAT, Executrix of the Estate of GEORGE MOFFAT, Deceased, Defendant--Appellant,	Appeal from the Circuit Court of Will County.

WOLFE - J.

This is an appeal from an order granting the appellee-plaintiff, a new trial. The same was allowed the 22d day of April, 1937. The cause of action arose out of an automobile accident which occurred on the 17th day of January, 1935, in Will County on Route 4 of the highway system of the State of Illinois. The suit was brought to recover damages for the death of the plaintiff's intestate, the appellee herein, and was started against one George Moffat, who was the original defendant in the case. Subsequent to the institution of the suit, George Moffat died, and upon his death the appellant was substituted as party defendant, by order of the court.

The complaint consisted of three counts. The first count alleges that the plaintiff's intestate was walking upon the said highway and in the exercise of due care and caution for his own safety; that the defendant's testate operated an automobile in a northerly direction on said highway, Route 4, and carelessly, negligently, and improperly managed and operated his automobile; that by and through the negligence and improper conduct of said defendant's intestate, and without any want of due care on the part of plaintiff's intestate, the said automobile ran into and struck with great force and violence, plaintiff's intestate, whereby he was in

AT SPR

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

February Term, A. D. 1928

MARTIN VOGEL, Administrator of the Estate of JOHN VOGEL, Deceased, Plaintiff--appellee,	
vs.	Appeal from the Circuit Court of Will County.
INGER BUTTAL, Guardian of the Estate of ERNESTINE BUTTAL, Deceased, Defendant--appellant.	

FILED - 1.

This is an appeal from an order granting the appellee-plaintiff, a new trial. The case was filed the 2nd day of April, 1927. The cause of action arose out of an automobile accident which occurred on the 17th day of January, 1925, in Will County on Route 4 of the highway system of the State of Illinois. The suit was brought to recover damages for the death of the plaintiff's intestate, the appellee herein, and was started against one George Buttal, who was the original defendant in the case. Subsequent to the institution of the suit, George Buttal died, and upon his death the appellant was substituted as party defendant, by order of the court.

The complaint consisted of three counts. The first count alleges that the plaintiff's intestate was walking upon the said highway and in the exercise of due care and caution for his own safety; that the defendant's testate operated an automobile in a northerly direction on said highway, Route 4, and negligently, negligently, and improperly managed and operated his automobile; that by and through the negligence and improper conduct of said defendant's intestate, and without any want of due care on the part of plaintiff's intestate, the said automobile ran into and struck with great force and violence, plaintiff's intestate, whereby he was

injured, etc., and as a consequence of such injuries, died. The complaint then continues with an allegation of issuance of letters of administration, the damage, etc.

The second count of the complaint charges substantially as the first count, regarding the location of the accident; that plaintiff's intestate was a pedestrian, and continues with the negligence charge against defendant's testate in that he violated Section 22 of the Motor Vehicle Law and operated his automobile at a speed greater than was reasonable and proper in regard to the traffic and use of the way so as to endanger the life and limb or injure the property of any person.

The third count charges the violation of Section 40 of the Motor Vehicle Law, which provides that upon approaching a person walking upon or along a public highway, the operator of a motor vehicle shall give reasonable warning of his approach, etc. This count further alleges defendant's testate failed to give such warning and by such negligence on the part of defendant's testate, the plaintiff's intestate was struck by the automobile and sustained injuries from which he died.

The defendant, appellant herein, filed an answer to the complaint denying each and every charge of negligence made against the defendant's testate and further expressly denied that defendant's testate operated, managed, possessed, controlled, drove or propelled the automobile or motor vehicle mentioned in plaintiff's amended complaint, either individually or by or through his agent or servant, and denied the control or possession of the instrumentality causing the alleged death of the plaintiff's intestate.

The case was submitted to a jury, evidence was heard and the jury found the issues in favor of the defendant. The plaintiff made a motion for a new trial. The Court sustained the motion and

injured, and as a consequence of such injuries, died. The complained case continues with an allegation of insanity of injury of administration, the damage, etc.

The second count of the complaint charges substantially as the first count, regarding the liability of the appellant; that plaintiff's intestate was a passenger, and sustained when the negligence charge against defendant's insanity in that he violated section 49 of the motor vehicle law and exceeded his automobile at a speed greater than was reasonable and proper in regard to the traffic and use of the way so as to endanger the life and limb or injure the property of any person.

The third count charges the violation of section 40 of the motor vehicle law, which provides that upon approaching a person walking upon or along a public highway, the operator of a motor vehicle shall give reasonable warning of his approach, etc. This count further alleges defendant's inability failed to give such warning and by such negligence on the part of defendant's insanity, the plaintiff's intestate was struck by the automobile and sustained injuries from which he died.

The defendant, by plaint herein, filed an answer to the complaint charging each and every charge of negligence made against the defendant's insanity and further expressly denied that defendant's insanity operated, managed, possessed, controlled, drove or propelled the automobile or motor vehicle mentioned in plaintiff's amended complaint, either individually or by or through his agent or servant, and denied the control or possession of the instrumentality causing the alleged death of the plaintiff's intestate.

The case was submitted to a jury, evidence was heard and the jury found the issues in favor of the defendant. The plaintiff made a motion for a new trial. The Court sustained the motion and

granted a new trial. It is from this order of the trial court in granting the plaintiff a new trial that this appeal is prosecuted.

At the time the case was called for trial, the plaintiff filed a motion, supported by affidavit, requesting leave of court to ask the prospective jurors whether any of them were interested, financially or otherwise, in the "All States Insurance Company" or the "Indemnity Company of North America". Counsel for the defendant admitted in open court that he represented the Indemnity Insurance Company of North America in the defense of the case. The case was set for trial on March 22, 1937, at 10:00 o'Clock A. M. and this motion and affidavit were presented to the court and counsel for the defendant at 10:05 o'clock A.M., just before the examination of the prospective jurors. Counsel for the defendant asked the court for one day's time to submit to the court an affidavit showing that none of the jurors to sit in the cause were interested as stockholders, financially or otherwise, directly or indirectly, in either of said insurance companies. Counsel for plaintiff stated that they had no positive proof to submit to the court showing that any of the prospective jurors had such interest in either of such insurance companies. The court denied defendant's counsel's request for one day's continuance and ruled that counsel for the plaintiff could ask the jury generally if they had any interest in any corporation without naming the corporation.

The learned trial judge in his statement (which is incorporated in the record) of the reason why he granted the plaintiff a new trial, said, that in his opinion the verdict is contrary to the weight of the evidence and he was in doubt concerning his ruling on the motion of plaintiff to be allowed to ask the jury if they had any financial interest in an insurance company.

Probably the leading case on whether such questions can be propounded to a juror on his voire dire is, Iroquois Furnace Co. vs. McCrea, 191 Ill., 340, in which the court says: "It is complained

granted a new trial. It is from this order of the trial court in granting the plaintiff a new trial that this appeal is reasoned.

At the time the case was called for trial, the plaintiff filed a motion, supported by affidavit, requesting leave of court to use the prospective jurors whether any of them were interested, financially or otherwise, in the "All Types Insurance Company" or the "Indemnity Company of North America". Counsel for the defendant admitted in open court that he represented the Indemnity Insurance Company of North America in the defense of the case. The case was set for trial on March 23, 1937, at 10:00 o'clock a. m. and this motion and affidavit were presented to the court and counsel for the defendant at 10:00 o'clock a.m., just before the examination of the prospective jurors. Counsel for the defendant asked the court for one day's time to submit to the court an affidavit showing that none of the jurors to sit in the case were interested as stockholders, financially or otherwise, directly or indirectly, in either of said insurance companies. Counsel for plaintiff stated that they had no positive proof to submit to the court showing that any of the prospective jurors had such interest in either of said insurance companies. The court denied defendant's counsel's request for one day's continuance and ruled that counsel for the plaintiff could ask the jury whether if they had any interest in any corporation without naming the corporation.

The learned trial judge in his statement (which is incorporated in the record) of the reason why he granted the plaintiff a new trial, said, that in his opinion the verdict is contrary to the weight of the evidence and he was in doubt concerning his ruling on the motion of plaintiff to be allowed to ask the jury if they had any financial interest in an insurance company.

Probably the leading case on whether such questions can be propounded to a juror on his voire dire is, Insurance Company vs. Mosness, 1st Ill., 440, in which the court says: "It is contended

that the court erred in permitting counsel for appellee to question certain jurors upon their voire dire as to their interest in the Union Casualty Company. It appears that an attorney, representing that company, was present with the attorneys for appellant at the trial. The question was proper at least for the purpose of enabling counsel to exercise their right of peremtory challenge, if for no other purpose. (O'Hare v. Chicago, Madison and Northern Railroad Co. 139 Ill., 151; American Bridge Works v. Pereira, 79 Ill. App., 90, and cases therein cited.)"

In the case of New Aetna Portland Cement Co. vs. Hatt, 231 Federal, at page 617, the advisability of asking such questions in impanelling a jury was discussed. The court in its opinion use this language: "(7) Other errors are assigned, and they have been carefully considered; we are convinced that they were not prejudicial. There is one, however, which we think ought to be specially noticed. It relates to the impaneling of the jury. Counsel for the administrator were permitted to ask the talesmen, separately, upon their voir dire, whether any of them had ever been in the insurance business or had ever been an agent for the Baltimore Fidelity & Casualty Company of Baltimore, Md. One of the talesmen, in answer to the first question, said that he had not, and another one said that he had been in the insurance business, though no answer appears to have been made to the second question. Counsel for the company objected to the questions and requested the court to warn counsel for plaintiff against asking such questions. The court was disposed to allow "a very broad range"; exceptions were reserved, and error is assigned here. The relevancy and the propriety of such questions as these have been the subjects of frequent decision, where they have been presented (a) in the impaneling of a jury, or (b) in the examination of witnesses. A manifest distinction arises concerning the pertinence of the questions when testing the qualifications of proposed jurors and when determining the admissibility of evidence under distinct issues during the trial.

that the court erred in permitting counsel for appellee to question certain jurors upon their voire dire as to their interest in the Union Casualty Company. It appears that an attorney, representing that company, was present with the attorneys for appellant at the trial. The question was proper at least for the purpose of enabling counsel to exercise their rights of peremptory challenge, if for no other purpose. (O'Hara v. Chicago, Indiana and Western Railroad Co. 129 Ill., 181; American Express Co. v. Pantle, 78 Ill. App., 30, and cases nowhere cited.)"

In the cases of Van Zetta Portland Cement Co. vs. Lett, 201 Mass., at page 117, the advisability of asking such questions in impanelling a jury was discussed. The court in its opinion was this language: "(7) Other errors are assigned, but they have been carefully considered; we are convinced that they were not prejudicial. There is one, however, which we think ought to be specially noticed. It relates to the impanelling of the jury. Counsel for the administrator were permitted to ask the talesmen, separately, upon their voir dire, whether any of them had ever been in the insurance business or had ever been an agent for the Baltimore Liability & Casualty Company of Baltimore, Md. One of the talesmen, in answer to the first question, said that he had not, and another one said that he had been in the insurance business, though no answer appears to have been made to the second question. Counsel for the company objected to the questions and requested the court to warn counsel for plaintiff against asking such questions. The court was disposed to allow 'a very broad range'; exceptions were reserved, and error is assigned here. The relevancy and the propriety of such questions as these have been the subjects of frequent decision, where they have been presented (a) in the impanelling of a jury, or (b) in the examination of witnesses. A manifest distinction arises concerning the participation of the questions when testing the qualifications of proposed jurors and when determining the admissibility of evidence under distinct issues during the trial.

The weight of authority favors the allowance of such questions and the answers, where the questions appear to be presented in good faith and for the purpose only of ascertaining the fitness of persons summoned as jurors." (Here follows a long list of citations, including Iroquois Furnace Co. vs. McCrea, 191 Ill. 340,)

"On the other hand, there is a distinct class of decisions forbidding such questions, as well as the answers, while the cause is in course of trial; the theory of these decisions is that, since there are no issues to which the questions and answers can have any relevancy, the real object of the questions is to suggest to the jury that the defendant is protected against loss by an indemnitor not a party to the cause; and the practice occasionally resorted to of so interrogating witnesses is completely removed by action of the trial judge, is in effect penalized by reversal of the case in the reviewing court. ***

"The instant case of course concerns the relevancy of such inquiries and answers only as they occur in examinations made with reference to impaneling a jury. Where it appears to the satisfaction of the trial judge that the object sought through such inquiries and answers as these is in reality solely to test the qualifications of the proposed jurors, the defendant failing, as here, to show that such indemnity does not exist, we think appropriate questions and answers should be allowed under supervision of the court. We do not see why this might not ordinarily be done effectively by a general question put to the prospective jurors collectively; but we are not disposed to hold that questions may not be allowed and answered individually, where in the sound discretion of the judge such course is deemed necessary. The fact is too well understood to require more than a mere statement that in cases where the right of trial by jury exists litigants are entitled to have their cause tried before an impartial jury; and perhaps the most effective means of securing this

the weight of authority favors the difference of such questions and the answers, where the questions appear to be presented in good faith and for the purpose only of ascertaining the fitness of persons announced as jurors." (here follows a long list of citations, including Proprietors Church vs. Grant, 147 Ill. 544.)

"On the other hand, there is a distinct class of decisions rejecting such questions, as well as the answers, while the same is in source of trial; the theory of these decisions is that, since there are no issues to which the questions and answers can have any relevancy, the real object of the question is to suggest to the jury that the defendant is prosecuted against less by an insurance not a party to the cause; and the practice occasionally resorted to of an interrogating witnesses is immediately removed by action of the trial judge, is in effect prohibited by invoking of the case in the reviewing court. ***

"The instant case of course concerns the relevancy of such inquiries and answers only as they occur in examinations made with reference to impanelling a jury. There is apparent to the antagonism of the trial judge that the object sought through such inquiries and answers as these is in reality solely to test the qualifications of the proposed jurors, the defendant failing, as here, to show that such inquiry does not exist, we think appropriate questions and answers should be allowed under supervision of the court. We do not see why this might not ordinarily be done effectively by a general question put to the prospective jurors collectively; but we are not disposed to hold that questions may not be allowed and answers individually, where in the sound discretion of the judge such course is deemed necessary. The fact is too well understood to require more than a bare statement that in cases where the right of trial by jury exists litigants are entitled to have their cause tried before an impartial jury; and perhaps the most effective means of securing this

end is through an intelligent and legitimate exercise of the right of challenge, both peremptory and for cause."

In the case of Aetitus vs. Spring Valley Coal Co., 246 Ill., 32, the court in their opinion say, "The attorney for defendant in error inquired of two of the jurors, on their voire dire, if they were interested in any casualty company which insured employers of labor against damages for injuries to employees. The court sustained an objection to that course of examination. Such examination, if made for the purpose of enabling counsel to exercise their right of peremptory challenge, was held in Iroquois Furnace Co. vs. McCrea, 191 Ill., 340, to be proper. The trial court sustained an objection to the examination, and doubtless was of the opinion, from the character of the examination and the persons who were being interrogated, that the questionw were not asked for the purpose of exercising the right of peremptory challenge of said jurors, but that the examination, under the authority of McCarthy vs. Spring Valley Coal Co., 232 Ill., 473, was improper."

In the recent case of Smithers vs. Henriquez, 287 Ill. App., 95, the court in a similar case reviews many cases and finally concludes that such examination is proper.

In the case of Frochter vs. Arenholz, 242 Ill. App., 93, in passing upon a similar question the court used this language: "Counsel for the respective plaintiffs in error complain that prejudicial error arose out of the conduct of counsel for defendant in error in the examination of a juror, and also in the examination of a witness. It is claimed that this led the jury to believe there was an insurance company interested in the defense of the case. The questions asked the juror and his answers showed that he was employed by an insurance companyband that one of counsel for George Arenholz represented the same company. There is nothing in the examination of the juror to indicate that the questions were asked for any other purpose than to enable counsel to exercise his

and is dressed as instructions and legitimate exercise of the right of challenge, both peremptory and for cause."

In the case of People vs. Spring Valley Coal Co., 240 Ill., 32, the court in their opinion say, "The attorney for defendant in error inquired of two of the jurors, on their voire dire, if they were interested in any casualty company or the insurance employees of labor unions because for injuries to employees. The court sustained an objection in that course of examination. Upon examination, if made for the purpose of enabling counsel to exercise their right of peremptory challenge, was held in Dunnels Dresses vs. Ry. Co., 191 Ill., 240, to be proper. The trial court sustained an objection to the examination, and contended was of the opinion, from the character of the examination and the questions are more being interrogated, that the questions were not asked for the purpose of exercising the right of peremptory challenge or challenge for cause, but that the examination, under the authority of Spring Valley Coal Co., 240 Ill., 470, was improper."

In the recent case of Dunlavey vs. Dunlavey, 287 Ill. 4up., 99, the court in a similar case reviewed and cited the Illinois cases that upon examination is proper.

In the case of Brandner vs. Brandner, 241 Ill. App., 77, in passing upon a similar question the court used this language: "Counsel for the respective plaintiffs in error contain that prejudicial error arose out of the conduct of counsel for defendant in error in the examination of a juror, and also in the examination of a witness. It is claimed that this led the jury to believe there was an insurance company interested in the defense of the case. The questions asked the juror and his answers showed that he was employed by an insurance company and that one of counsel for George Brandnir represented the same company. There is nothing in the examination of the juror to indicate that the questions were asked for any other purpose than to enable counsel to exercise his

right of challenge. Iroquois Furnace Co. vs. McCrea, 191 Ill., 340; Aetitus vs. Spring Valley Coal Co., 246 Ill., 32."

In the case of Egner vs. Curtis Towle and Paine Company, a Nebraska case, reported in 146 N. W. 1032, L. R. A. 1915 A, at page 153, this case follows the rule that such examination is proper, and cites in the note numerous other courts that follow the same rule.

From an examination of the different authorities it is our conclusion that it is largely in the discretion of the trial court as to whether such examination is proper. If the trial court is convinced that the attorney asks the question solely for the purpose of information in his desire to get the attitude of the juror relative to a challenge for cause or peremptory challenge, and not for the purpose of bringing before the jury that one or both of the parties carry insurance, then we think such examination, subject to the discretion of the court, is proper.

The court, as before stated, in giving his reasons for granting the new trial, said that he was not satisfied with the verdict since it was against the weight of the evidence. Under this state of the facts, the rule as stated in Adamsen vs. Magnelia, 260 Ill. App., 418, at page 422, is applicable, and is as follows: "In general, the application for a new trial is addressed to the judicial discretion of the trial court. Appel vs. Chicago City Ry. Co., 259 Ill. 581. Notwithstanding the provision of the recently enacted Civil Practice Act authorizing an appeal from an order granting a new trial, the trial courts are, generally speaking, clothed with a discretion, as at common law, to be exercised in such manner as will best answer the ends of justice when granting motions for a new trial, Hewitt v. Jones, 72 Ill. 218. The discretion exercised by a trial court where it grants a new trial is now subject to review. Section 77 of Civil Practice Act, Cahill's St. ch. 110, paragraph 205; Yarber v. Chicago & Alton Ry.

right of qualifying. Lamunds Fabriks Co. vs. Nelson, 147 Ill., 544; Martins vs. Peoples Fuel Gas Co., 146 Ill., 18."

In the case of Lauer vs. Gurtis Tools and Plans Company, a Nebraska case, reported in 140 N. W. 1024, on p. 1122, we read: "In this case trial judge has ruled that such examination is proper, and cites in the note numerous other works that follow the same rule.

From an examination of the different authorities in it our conclusion that it is largely in the discretion of the trial court as to whether such examination is proper. If the trial court is convinced that the attorney asks the question solely for the purpose of information in his desire to get the evidence of the juror relative to a challenge for cause or peremptory challenge, and not for the purpose of bringing before the jury such one or both of the parties over instructions, then we think such examination, subject to the discretion of the court, is proper.

The court, as before stated, in giving his reasons for granting the new trial, said that he was not satisfied with the verdict alone in the against the weight of the evidence. Under this state of the facts, the rule as stated in Lawrence vs. Barrett, 200 Ill. App., 432, at page 434, is applicable, and is as follows: "In general, the application for a new trial is addressed to the judicial discretion of the trial court. Lynd vs. Chicago City Ry. Co., 229 Ill. 581. Notwithstanding the provision of the recently amended Civil Practice Act authorizing an appeal from an order granting a new trial, the trial courts are, generally speaking, clothed with a discretion, as at common law, to be exercised in such manner as will best answer the ends of justice when granting motions for a new trial. Smith v. Jones, 77 Ill. 234. The discretion exercised by a trial court where it grants a new trial is not subject to review. Section 77 of Civil Practice Act, Smith's St. ch. 110, paragraph 205; Farmer v. Chicago & Alton Ry.

Co., 235 Ill. 589. In cases on appeal where it was contended that the trial court erred in granting a motion for a new trial, the Appellate Court has held that where such motion is based on questions of fact arising at the trial, or on matters which occur in the presence of the court during the trial, a court of review will not interfere with the order granting the new trial unless the record shows a clear abuse of discretion of the trial court in granting the motion. Barthelman v. Braun, 278 Ill. App., 384; Village of LaGrange v. Clark, 278 Ill. App., 269; Gavin v. Keter, 278 Ill. App., 308."

Under the record in this case we cannot say that the trial court abused his discretion in setting aside the verdict of the jury and granting the plaintiff a new trial.

After this opinion was prepared, the Supreme Court has reviewed the case of Smithers vs. Henriquez, 287 App., 95, and affirmed the decision of the Appellate Court. (Smithers vs. Henriquez, case No. 24,040, not yet reported.)

The order of the trial court setting aside the verdict and granting a new trial, is hereby affirmed.

Judgment affirmed.

co., 245 Ill. 489. In cases on appeal where it was considered that the trial court erred in granting a motion for new trial, the appellate court has held that where such motion is based on questions of fact arising at the trial, or on matters which occur in the presence of the court during the trial, a court of review will not interfere with the order granting the new trial unless the record shows a clear abuse of discretion of the trial court in granting the motion. Bartelsman v. Kraus, 270 Ill. App. 504; Village of Lemonge v. Clark, 272 Ill. App. 449; Swain v. Lester, 272 Ill. App. 500."

Under the record in this case we cannot say that the trial court abused his discretion in setting aside the verdict of the jury and granting the plaintiff a new trial.

For this opinion was prepared, the Supreme Court has reviewed the case of Baldwin vs. Lorimer, 327 Ill., 43, and affirmed the decision of the appellate court. (Baldwin vs. Lorimer, case No. 24,040, not yet reported.)

The order of the trial court setting aside the verdict and granting a new trial, is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

Opinion filed

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PUBLISHED IN ABSTRACT

R. J. Shotwell and J. P. Shotwell, Plaintiffs-Appellants,
v. Robert P. Tate, Defendant-Appellee.

Appeal from Circuit Court McLean County.

JANUARY TERM, A. D. 1938. 295 I.A. 624

Gen. No. 9106 **Agenda No. 13**

MR. JUSTICE FULTON delivered the opinion of the Court.

This suit was filed by the Appellants R. J. Shotwell and J. P. Shotwell, real estate brokers to recover the sum of $575.00, and interest thereon, from the 4th day of March, 1937, covering commissions claimed to be due them from the Appellee for procuring for him a buyer for a tract of land of approximately 125 acres. A trial was had before the Court without a jury. The Court found the issues for the Appellee and judgment was entered on the finding. This appeal is prosecuted from the said judgment.

The complaint alleges that the Appellee employed the Appellants to procure for him a purchaser for the real estate in question, and agreed in event such purchaser was so procured to pay the Appellants the usual and customary brokerage fees, amounting to $575.00; that thereafter the Appellants did procure and tender to the Appellee a purchaser who did on the 15th day of January, A. D. 1937, enter into a written contract with the Appellee for the purchase of said property; and that the purchaser Jacob Lutz, was able to perform the terms of his contract; that at the time of making of said contract the Appellee had not yet taken title to the premises, although he had a contract for the purchase of same from Dwight Dooley and Roland S. Dooley; that in the written contract between the Appellee and purchaser Lutz was inserted the following clause:

> 'If this deal is finally consummated, the first party agrees to pay to R. J. Shotwell and J. P. Shotwell, brokerage in connection with this deal as agreed upon, but if this deal does not go through then there shall be no brokerage paid in connection therewith.''

It was further alleged that in this connection that the foregoing paragraph referred to and was intended to refer only to the possible inability of the Appellee

to obtain title from Dwight Dooley and Roland S. Dooley, which title was in fact taken by the said Apellee in time to comply with the terms of his agreement with Jacob Lutz.

The controversy between the parties arises from the fact that notwithstanding the written agreement and the procuring of the title from the Dooley's, that the sale was not completed by the delivery of the deed from Appellee to Lutz, and payment by Lutz of the purchase price. The Appellee claimed in his answer that he was willing to complete the contract but that the purchaser was not, and refused to accept the title to the premises as shown by the abstract, and that because of this circumstance the Appellee was relieved from the liability to pay brokerage commission by the provision in the contract between the Appellee and Lutz which was approved by the Appellants, and was in effect that if the deal did not go through there would be no brokerage paid in connection therewith.

The evidence of the Appellee showed that on or about March 1st, at the time the contract was to be closed Appellee tendered the abstract to the purchaser, who after submitting it to examination refused to accept the propery because the abstract did not show a merchantable title. The Appellee contended the title was merchantable and that he had accepted it for himself. Later the purchaser, Jacob Lutz, recorded the contract and insisted that the Appellee should make the title merchantable. He further testified that the purchaser threatened to sue him for specific performance of the contract. There was a provision in the contract that in case the deal for the purchase of the farm did not go through it was understood and agreed that the purchaser should lease the premises for the following year beginning March 1st, 1937. After the disagreement over the title the lease was actually executed and the said Jacob Lutz went into possession as a tenant, after the contingency of the deal not going through had happened.

It is insisted by the Appellants that the only contingency upon which the payment of commission depended was the procuring of title by Appellee from the Dooley's and that contingency having been met the commission was due to the Appellants without regard to any question of title arising between the seller and the buyer. In support of their theory of the case the Appellants rely mainly upon the case of *Myers* v. *Buell,* 142 Ill. App. 467. In that case the

testimony showed a positive agreement between the owner and the real estate agent to pay the sum of $200.00, by way of commission for securing a trade for the owners city real estate for farm property. The trade was secured and the contract signed. After the agreement had been executed the owner refused to carry out the terms of the contract for arbitary reasons of his own. The Court found that he was the one who prevented the exchange of papers and no reason was shown whatever as to why he should not have performed his contract. In this case the reason that the contract was not completed was because the purchaser, Jacob Lutz, refused to accept the title. So far as the testimony discloses the purchaser demanded that the title be quieted which the Appellee refused to do. This apparently ended the negotiations for the sale of the premises and the alternate provision for leasing was entered into by the parties to the contract. The circumstances are quite different from the facts shown in the case referred to as supporting the claim of the Appellants in this case.

Under these circumstances we cannot agree with the Appellants that the following clause referred to the contract between the Dooley's and the Appellee. The paragraph which was acquiesced in and approved by the Appellants, reading as follows:

> "If this deal is finally consummated, the first party agrees to pay to R. J. Shotwell and J. P. Shotwell, brokerage in connection with this deal as agreed upon, but if this deal does not go through then there shall be no brokerage paid in connection therewith."

If the Appellants had performed all of the services required by them and were entitled to their commission at the time the contract was entered into, we can see no reason why they should in writing have agreed to the terms of the contract containing the above provision. In the case, *Matteson* v. *Walker*, 249 Ill. App. 404, the Court had occasion to construe a somewhat similar provision in a contract. The owner of the property in that case mailed a letter to the real estate firm containing the following clause:

> "If the deal falls through and the sale is not made whatever the reason may be, Mr. Walker will pay no commission."

The real estate firm who were the Plaintiffs in the case accepted the terms of said letter. It was not disputed but that the plaintiffs would have been entitled

to a commission but for the foregoing clause. The Court held that the parties must be bound by their contract and the right to recover such commission was not confined to the negotiation of the sale but there must be something more than that under the terms of the contract; that there must be an actual consummation thereof. The sale fell through because the owner refused to sign the contract of purchase procured by the plaintiff and signed by the purchaser. The Court stated that it might be an unfortunate contract for the plaintiff but nevertheless it was binding.

It is urged by the Appellants that their right to a commission had become absolute prior to the time that they accepted the contract, and while it may be true that they had entirely fulfilled their obligation by producing a purchaser and that nothing remained for them to do but to collect their commission, they base their recovery upon a written contract which they had approved. It may seem arbitrary and perhaps inequitable to prevent them from recovering a commission earned but their own act in agreeing to the terms of the written contract, unambiguous in its terms, providing that if the deal does not go through there shall be no brokerage paid in connection therewith is binding upon them. As we view the contract the Appellee may have had in mind the possibility of the contract not being performed and therefore, attempted to protect himself against the payment of a commission if such a contingency might happen.

In accordance with the views herein expressed, we believe that the judgment of the trial court should be affirmed.

Affirmed.

(Five pages in original opinion.)

PUBLISHED IN ABSTRACT

The People of the State of Illinois, for the Use of U. G. Usher and Nick Kish, Plaintiffs-Appellees, v. Erma Templeman and Fred A. Ebinger, Defendants-Appellants.

295 I.A. 625

Appeal from County Court, Sangamon County.

JANUARY TERM, A. D. 1938.

Gen. No. 9086 **Agenda No. 1**

MR. JUSTICE FULTON delivered the opinion of the Court.

This was a suit to recover damages on a supersedeas replevin appeal bond filed in the office of the Clerk of this Court on January 10th, 1936. The bond was signed by Erma Templeman as principal, and Fred A. Ebinger as surety. The suit upon which this appeal is based was tried in the County Court of Sangamon County on November 6th, 1936. The complaint charged that the Appellants signed a supersedeas replevin appeal bond from a judgment obtained in the Circuit Court of Sangamon County whereby Erma Templeman was ordered to deliver to U. G. Usher and Nick Kish one Chevrolet coach. The judgment of the Circuit Court was affirmed by this Court on June 3rd, 1936, and rehearing denied on October 6th, 1936. The complaint further charged that the Appellants had failed to return the car replevined, and had failed to save and keep harmless the Plaintiffs, and that they were damaged in the sum of $750.00.

The admissions in the pleadings and the testimony in the case disclose the following facts; a replevin suit was started by the Appellant Erma Templeman on February 14th, 1935, seeking to recover the Chevrolet coach above mentioned. That cause was instituted in the Justice Court and the replevin bond signed by Claude R. Seward. Erma Templeman lost the case in the Justice Court and took an appeal to the Circuit Court of Sangamon County; on February 25th, 1935, Claude R. Seward signed the replevin appeal bond to that Court. The case was tried before a jury in the Circuit Court and the verdict of the jury ordered the return of the car to the defendants in that case. A writ of *retorno habendo* was subsequently issued. On May 13th, 1935, an appeal bond was signed by the Ap-

pellant Erma Templeman with Roscoe Lee Calverd and Mary Rennie as sureties. That appeal was dismissed by this Court on October 4th, 1935, because the Appellant failed to file notice of appeal within 90 days and rehearing was denied on January 3rd, 1936. On January 10th, 1936, Erma Templeman filed her petition in this Court for leave to appeal within one year, and at that time filed with the Clerk of this Court her supersedeas replevin appeal bond in the sum of $750.00, signed by herself as principal and Fred A. Ebinger as surety. The judgment of the Circuit Court of Sangamon County was affirmed on June 3rd, 1936, and rehearing denied on October 6th, 1936. Claude R. Seward, who signed the original bond in the Justice Court on February 14th, 1935, and also the appeal bond to the Circuit Court, February 25th, 1935, settled his liability on June 12th, 1936, and secured a release.

Another suit was started against Erma Templeman, Roscoe Lee Calverd and Mary Rennie on the appeal bond dated May 13th, 1935, in the Justice Court. That suit was lost on the grounds that the case was prematurely brought and an appeal taken to the County Court of Sangamon County, Illinois, and in that Court the cause of action was dismissed without prejudice by the Plaintiffs, who are the Appellees in this cause. Another suit was filed in the County Court of Sangamon County on the same bond and against the same parties. That suit was tried before Judge Harlington Wood and judgment was entered for the Plaintiffs, who are the Appellees in this cause, for the sum of $360.00, and costs of suit. That judgment was affirmed in this Court on October 8th, 1937.

The present suit was started in the County Court of Sangamon County against Erma Templeman and Fred A. Ebinger on the supersedeas replevin appeal bond, dated January 10th, 1936. The Appellants demanded a jury trial. On a hearing the jury returned a verdict against the Appellants in the sum of $725.00, and costs of suit. This appeal is prosecuted for the purpose of reversing that judgment.

To the complaint, the Appellants filed five special pleas in bar and a counter-claim. The Appellants first amended plea attempted to plead *res adjudicata* on the grounds that U. G. Usher and Nick Kish had sued on the identical bond before a Justice of the Peace, and the judgment in that case was a bar to this suit. To this amended plea in bar the Appellees filed a motion to strike alleging that the present suit was upon an

appeal bond given in this Court on January 10th, 1936, signed by Erma Templeman and Fred A. Ebinger and that the suit before the Justice of the Peace was against Erma Templeman, Roscoe Lee Calverd and Mary Rennie, and was upon a different instrument involving different liabilities and between different parties. The records of the respective suits were introduced in evidence before the trial Judge and on hearing the motion to strike the said plea was allowed.

The amended second plea in bar of the Appellants developed a similar situation covering the bond filed May 13th, 1935, signed by Erma Templeman, Roscoe Lee Calverd and Mary Rennie, wherein a judgment for $360.00, had been obtained against them in the County Court of Sangamon County. The records of the suits were again introduced in evidence showing that the bond relied upon in the plea was a different instrument involving different liabilities and between different parties. The motion to strike the amended second plea in bar was allowed.

In the amended third plea the Appellants set up that no order was made awarding the return of the car to U. G. Usher and Nick Kish, and that no mandate or certified copy of the order of the Appellate Court had ever been filed with the Clerk of the Circuit Court of Sangamon County, and therefore, the Court was without jurisdiction to hear the cause. The Appellees filed a motion to strike the said plea alleging that the order of affirmance by the Appellate Court had been filed with the Clerk of the Circuit Court, and on a hearing on said motion the certificate of the order of affirmance showing a filing mark of November 6th, 1935, was presented for the inspection of the Court, whereupon the motion to strike said third plea was allowed.

In the amended fourth plea the Appellants alleged that the automobile in controversy in the replevin suit had been taken by the Rasar Collection Agency, and therefore, there was no liability against the Appellants on said bond. The Appellees challenged the sufficiency of this plea on the grounds that it was an attempt to adjudicate matters between persons not parties to the litigation, and the motion to strike this plea was allowed.

In the fifth plea in bar the Appellants alleged that U. G. Usher and Nick Kish had executed a release to Claude R. Seward for his liability upon the bonds given before the Justice of the Peace in the original replevin suit. A motion to strike this plea was al-

lowed on the grounds that it was between separate and distinct parties involving separate and distinct liabilities.

The Appellants also filed an amended counter-claim alleging that Erma Templeman had paid part of the purchase price of the automobile in controversy, and that since the replevin suit was tried she had paid additional money on the conditional sales contract on said automobile and that she was therefore entitled to a counter-claim against the Appellees in the sum of $430.66. To this amended counter-claim the Appellees filed a plea of former suit pending, and upon the hearing testimony was taken showing the pendency of a prior suit between the same parties in the Circuit Court of Sangamon County, Illinois. The Court therefore sustained the plea of former suit pending and dismissed the amended counter-claim.

The Appellants assign as error the rulings of the trial Court allowing the motions to strike the five special pleas and also sustaining the plea of former suit pending and the dismissal of the amended counter-claim.

It is apparent that on the question of res adjudicata the Court was entirely correct in allowing the motion to strike the first, second and fifth pleas. In order to sustain a plea of res adjudicata there must be an identity of parties, identity of subject matter and identity of cause of action. *Ropacki* v. *Ropacki*, 354 Ill. 502. *Markley* v. *The People*, 171 Ill. 260. Even a casual examination of the records and the instruments sued upon disclose the fact that there was no identity of parties or of the subject matter, and that matters in controversy in the former cases were different from those in the present case.

The assertion of the Appellants in their third plea that no mandate or certified copy of the order of the Appellate Court had been filed with the Clerk of the Circuit Court of Sangamon County was conclusively shown to be an error by the presentation of the order itself and upon the testimony of the deputy Circuit Clerk. The ruling of the trial court in allowing the motion to strike this plea was also correct. A mere inspection of the amended fourth plea in bar shows that the Appellants failed to set up any legal defense and the motion to strike was properly allowed.

On the hearing in the County Court of Sangamon County on the plea of former suit pending to the counter-claim of the Appellants, testimony was taken

which is not shown in the abstract filed by the Appellants in this court but the record discloses that there was pending before the Master in Chancery of the Circuit Court of Sangamon County a suit between Erma Templeman and U. G. Usher, involving the same subject matter and therefore, the County Court properly sustained the plea of former suit pending to the amended counter-claim of the Appellants.

It is also urged by the Appellants that the verdict and judgment in this case was excessive. The proof shows that the judgment of $725.00, awarded by the jury covered Attorney's fees, storage, printing, interest, court costs and other expenses of litigation all of which might reasonably be included in the terms of the supersedeas replevin bond upon which this suit is based. The jury had the opportunity of seeing and observing the witnesses, and there is nothing in the amount found by their verdict which would warrant a court in saying that their finding was against the manifest weight of the evidence, or grossly excessive.

We have examined the record and the assignments of error urged in behalf of Appellants and can find no substantial error on which to base a reversal of this cause. This is the fourth appeal coming to this court growing out of the controversy over the ownership of a Chevrolet automobile. We can find no meritorious defense presented by the Appellants and the judgment of the County Court of Sangamon County is therefore affirmed.

Affirmed.

(Seven pages in original opinion.)

PUBLISHED IN ABSTRACT

Warner W. Hurst, Plaintiff-Appellee, v. Horatio C. Bent, Defendant-Appellant.

295 I.A. 625

Appeal from Circuit Court, McLean County.

JANUARY TERM, A. D. 1938.

Gen. No. 9109 **Agenda No. 15**

MR. JUSTICE RIESS delivered the opinion of the Court.

Plaintiff Appellee Warner W. Hurst filed suit in the Circuit Court of McLean County against Defendant Appellant Horatio C. Bent and recovered judgment upon trial of the cause by the Court without a jury in the sum of $1167.50, as principal, interest and attorney fees alleged to be due on two promissory notes and a separate written contract and accompanying assignment under seal guaranteeing payment thereof, from which judgment the Defendant has appealed to this Court.

In the first count of the complaint, recovery was sought upon a promissory note dated May 1, 1927, in the principal sum of $400 due April 15, 1931, with interest at seven per cent per annum and providing in a warrant of attorney, for an attorney fee, signed by William F. Thaxton and Mary O. Thaxton, payable to the order of Defendant Horatio C. Bent, endorsed by him in blank and delivered to Plaintiff Appellee Hurst in October, 1927; that Plaintiff was the owner and legal holder thereof and that no part of same was paid; "that at maturity of said notes the same were duly presented for payment, and payment then and there demanded, but the same was not paid, all of which the said Defendant Horatio C. Bent had due notice." The second count so sought recovery upon a similar $400 note and warrant of attorney falling due on April 15, 1932.

A third or additional count alleged in substance the making, endorsement in blank and delivery of the notes to the Plaintiff in the manner set forth in the first and second counts; that at the time said notes were made and executed by said Thaxtons to the Defendant Bent, they entered into a certain written contract by the terms of which Defendant Bent contracted to sell to said Thaxtons a certain Lot 8 in Flagg's Second Addition to the City of Bloomington for a purchase price

of $6,000; that said notes were part of a series of notes described in said contract and given as part of the purchase price therefor, which contract of sale was assigned in writing by Defendant Bent to Plaintiff Hurst with a written guaranty of payment attached thereto, first reciting therein that "I would advise the endorsement of the notes by Horatio C. Bent and an assignment of the contract" and concluding as follows: "For value received I hereby sell, transfer and set over unto Warner W. Hurst all my right, title and interest in and to the within contract and I further guarantee the payment of the same," which was signed and sealed by the Defendant Horatio C. Bent and delivered to Plaintiff together with quit claim deed by Bent to said lot on October 10, 1927.

This sale contract dated March 19, 1927, and the assignment under seal with attached guaranty, which were exhibits to the complaint and offered in evidence (together with the two $400 notes) made provision for conveyance of the premises to said Thaxtons by warranty deed and certificate of abstractor showing good merchantable title, free and clear of all encumbrances except a $3,000 first mortgage lien held by the Bloomington Loan & Homestead Association and of $700 balance due on a mortgage to a certain Trustee therein named and provided for payment of the balance of said purchase price of $6,000 as follows: $600 cash; $300 payable April 15, 1927; $1400 in "four contract of sale notes" of $300, $400, $300 and $400, and that the covenants and agreements therein contained were to extend to and be obligatory on the heirs, executors, administrators and assigns of the respective parties. The unpaid notes for $300, $400 and $400 were so assigned in blank by Defendant before maturity and delivered to Plaintiff Hurst with the real estate sale contract, a quit claim deed to the premises by Brent and wife, together with the above mentioned assignment and guaranty under seal, on or about October 10, 1927. The $300 note was subsequently paid in full by Bent to Hurst, together with certain interest credits on the two $400 notes during the years of 1931 and 1932, and the remainder of the indebtedness was sought to be recovered in this suit.

Defendant Bent, who was a real estate dealer, acting *pro se* in the Trial Court, filed certain informal pleas thereto, one of which was designated as a demurrer and the other as a plea in bar, in which he contends *arguendo* that presentment of the notes to the makers

at maturity and notice to assignor of nonpayment does not create a cause of action against the endorser in blank unless Plaintiff alleges and proves insolvency of the makers or pursuit of diligent effort and failure to recover against the makers, and alleges that in October, 1927, the lot in question was deeded to Plaintiff Hurst by Defendant Bent as security for the notes in question; that thereafter Plaintiff conveyed his interest in said lot to the Bloomington Loan & Homestead Association, mortgagee, without consulting or giving notice to the Defendant, and thereby released the makers of said note from payment thereof and deprived Defendant as endorser of said notes of any recourse against said makers and so released the Defendant of liability thereon; that one of said makers was since deceased and the "other removed to parts unknown" to the Defendant.

Plaintiff filed no motion attacking the form or sufficiency of the answers, but replied by admitting the execution and delivery of said deed by Defendant to Plaintiff and by Plaintiff to the Bloomington Loan & Homestead Association, and denying all further allegations and conclusions of the Defendant. A purported rejoinder was filed by the Defendant consisting of an argument repeating the contention set up in his answers.

From the irregular and confused form of the pleadings, testimony, assignments of error, and the briefs and abstracts filed in this case, it is difficult to intelligently define and pass upon the issues involved.

The answer of Defendant admits execution and delivery of the notes and assignment of contract as alleged in the third count; admits the endorsement of the notes in blank to the Plaintiff by him, and does not therein deny that the notes were presented to the maker at maturity; that payment was demanded; that the same remained due and unpaid or the allegation that the Defendant had due notice thereof. There being no specific denial of these allegations, the same are to be taken as admitted. It is provided in Chapter 110, Section 164, Smith-Hurd 1937 Illinois Revised Statutes that "Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates." "Every allegation, except allegations of damages, not explictly denied, shall be deemed to be admitted," etc.

It appears from the evidence that Defendant Bent had purchased a certain lot on Clinton Boulevard in

Bloomington from Plaintiff Hurst and lacking sufficient cash funds, sought to use the Thaxton notes in part payment of the purchase price; that the Plaintiff refused to receive them, claiming that he found the Flagg Street Lot to be worth less than the existing liens against it, and would only take them in part payment for the lot upon the express written guaranty of payment by Bent, and that the amount due thereon constituted the balance of the purchase price due Plaintiff Hurst from Bent on the Clinton Boulevard Lot as a direct and primary personal obligation. The deal was closed, Bent quit claimed the Thaxton Lot, assigned the sale contract, gave the written guaranty under seal and endorsed the three notes in blank to Hurst, who thereupon deeded the Clinton Boulevard Lot to Bent in the exchange.

Plaintiff also testified in substance as to the amount due and unpaid, and the two notes and contract of sale and assignment with guaranty clause referred to in pleadings were offered and admitted in evidence. Defendant did not deny same in his testimony, but sought by reading written questions and answers propounded to himself to make proof concerning the value of the lot referred to in the contract, which questions and answers were so clearly improper in form and substance that objections thereto were sustained by the Court and no proof thereon appears in the record. None of the deeds referred to were attached as exhibits nor offered in evidence.

It further so appears from the evidence that the three unpaid notes were assigned by Defendant Bent to Plaintiff Hurst in connection with the above transactions; that one of these notes in the amount of $300 was later paid in full by Bent and that certain interest credits were paid upon the two $400 notes by both Bent and the Thaxtons in the gross amount of $104.50 (of which amount the Thaxtons paid $22.) Notice of nonpayment and dishonor was thereby waived by the Defendant who had guaranteed the payment of the three notes and had so made whole or partial payment thereof.

Section 130 of Chapter 98, being the present Negotiable Instruments Act, Illinois Revised Statutes of 1937, provides that:

> "Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied."

This Court held in *Wing* v. *Beach,* 31 Ill. App. 78, in speaking of waiver by an endorser, that "Waiver might be either express or implied from the circumstances—as by payment in part or an absolute promise to pay, made with knowledge of all the material facts operating to discharge him as indorser." The same rule is cited in *Citizens Securities* and *Investment Co.* v. *Dennis,* 236 Ill. App. 307, at page 321. In the case of *Stewart* v. *Soenksen,* 173 Ill. App. 1, under said Section 130 of the Negotiable Instruments Act, it is said that "such waiver may be implied from a variety of facts and circumstances," followed by a statement in substance of various grounds of waiver.

It further appears from the Plaintiff's evidence that demand had been made on the Thaxtons and that thereafter Defendant Bent made the payments as above. It is thus apparent that both by admission in his pleadings and by making such payments after becoming fully apprized of the default of the makers, the Defendant waived all notice of which he might otherwise seek to avail himself as a defense.

Defendant is furthermore liable as an absolute guarantor of payment under the specific provisions set out in the written assignment and guaranty of payment under seal, which was attached to the contract of sale, and which made the payment thereof a direct primary liability of the Defendant. *Beebe* v. *Kirkpatrick,* 321 Ill. 612, 152 N. E. 539; *Weger* v. *Robinson Nash Motor Co.,* 340 Ill. 81, 172 N. E. 7.

Where the guarantee is absolute, it is the duty of the guarantor to see to the payment of the money. In such a case no demand or notice of nonpayment is required, but the holder may institute suit at the maturity of the debt without taking any other steps. *Peterson* v. *Swanson,* 259 Ill. App. 80, *Dickerson* v. *Derrickson,* 39 Ill. 574; *Hance* v. *Miller,* 21 Ill. 636, Note, 20 L. R. A. 257.

Defendant claims release as guarantor on account of the quit claim deed from Hurst to the Bloomington Loan & Homestead Association, the mortgagee. The subsequent conveyance by Hurst of all interest in Lot 8 in Flagg's Second Addition to the Bloomington Loan & Homestead Association did not destroy the rights of the Thaxtons to make payment and demand the deed from the grantee under the terms of the sale contract, which had been taken subject to the two recorded mortgages and contract of sale liens thereon, nor did it constitute a release of Defendant's liability as an absolute guarantor.

As against the claim of the Plaintiff, a guarantor could, in any event, only be released to the extent of the amount of the damages actually sustained and proven by him at the trial. (*Swisher* v. *Deering,* 204 Ill. 203, 68 N. E. 517.) It clearly appears from the record that no competent legal proof of any such damage or loss was made nor was any legal offer of proof made by the Defendant, hence he cannot complain in this Court of any alleged damage which might, pro tanto, have lessened the claim of Plaintiff against him in the Court below.

Appellant assigns error by the Trial Court in allowing and including in the judgment, attorney fees in the sum of $80; being $40 on each of the two notes, which fees were provided for in the warrants of attorney, but were not provided for in the body of the notes. We deem this assignment of error to be well taken. In the case of *Mooney* v. *Valentynowicz,* 181 Ill. App. 428, it was held that such fee could not be properly allowed unless it was so provided for in the note, and in that case, the judgment for the amount due on the note was affirmed on condition that a remittitur for the amount of the attorney fees be entered or that otherwise the judgment would be reversed and the cause remanded.

Finding no further error in the record, it is the judgment of this Court that the judgment of the Circuit Court of McLean County be affirmed for the sum of $1087.50, provided that the Appellee enters in this Court a remittitur in the sum of $80 within ten days after the filing of this opinion; otherwise, the judgment will be reversed and the cause remanded.

Affirmed on Remittitur; otherwise Reversed and Remanded.

(Seven pages in original opinion.)

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1938.

Term No. 18 Agenda No. 17

LESLIE STANTON,
Plaintiff-Appellee,

vs.

DAVID R. KOMM et al.,
Defendants-Appellants.

Appeal from the
City Court of
East St. Louis,
Illinois.

295 I.A. 625

Murphy J:

The plaintiff, Leslie Stanton, brought this action to recover damages for personal injuries sustained while attending a moving picture show which was owned and operated by defendant, David R. Komm. The trial resulted in a verdict and judgment in favor of plaintiff for $1500.

The evidence, practically undisputed, shows that plaintiff with his wife and other relatives purchased tickets of admission to the show and were directed by an usher to a seat in the rear of the room. After they had been seated 30 or 40 minutes and while they were observing the picture, an iron pipe which was being used as a curtain support and which had been attached to the ceiling, fell striking plaintiff on the head.

The pipe which struck plaintiff is described as being three-quarters of an inch in diameter, 5 or 6 ft. long and was attached to a flange which was held to the ceiling by screws 2½ inches in length. The screws extended through the plastering and into a two by four inserted for a support. The pipe was used to support a velvet curtain 5 or 6 ft. in length about 4 ft. wide

and extended down from the pipe to a point near the top of the back of the row of seats in which plaintiff was seated.

The only explanation for the pipe falling is found in the evidence of defendant's assistant manager who testified for the defendant. He stated that for 2 or 3 weeks prior to the accident, and at times when the theater was crowded he had observed people hanging onto the curtain and putting their elbows on it and he testified that he thought this loosened the screws holding the pipe to the ceiling.

As grounds for reversal defendant urges that there was no evidence of negligence, error in the admission and rejection of evidence and in the refusal to give certain of defendant's instructions.

The owner of a theater is not an insurer but is liable only upon his failure to use reasonable care to make the premises reasonably safe for the purpose for which they were intended. Kiewert vs. Balaban & Katz Corp. 251 Ill. App. 342. There is no contention that plaintiff was guilty of contributory negligence. Where a person is in the exercise of due care for his own safety and is injured by instrumentalities under the control of another and the injury is inexplicable except on the hypothesis of negligence, a prima facie case is created and the law places the burden upon those in control of the instrumentalities to explain the cause of the accident and to show that they were free from negligence. To create such a presumption of negligence it is not necessary that the relationship of carrier and passenger exist. Kiewert vs. Balaban & Katz Corp. supra.

Defendant introduced evidence as to the care used in installing the pipe and the manner in which it was attached to the ceiling. It was held to the ceiling by means of four screws, 2½ inches in length which passed through the plastering, lath and into a two by four. It might be conceded that this was good construction but in view of the testimony of the assistant manager

that he had observed persons hanging and leaning against the curtain it became incumbent upon defendant to show that he had used reasonable care to determine whether or not such use of the curtain had loosened the pipe from the ceiling. In the absence of such proof, the presumption of negligence exists. The finding of the jury that the defendant was neglgient is sustained by the evidence.

In defendant's argument filed in this court, under the sub-division of excessive damages it is contended that the excessiveness of the verdict was due to erroneous rulings in the introduction of evidence of Dr. McFadden, a neurologist expert, who testified for the plaintiff.

Omitting the evidence of Dr. McFadden the remaining uncontradicted testimony shows that plaintiff received a scalp wound an inch and a quarter in length in the right templar parietal region. It cut through the skin and soft parts of the skull but there was no skull fracture. Immediately after the accident, plaintiff was directed to the defendant and the defendant suggested that he see a doctor. The doctor dressed the wound and stitched it using two stitches. The wound left a scar.

Plaintiff testified that he bled profusely and that thereafter and still is suffering headache and for a time he was nervous, dizzy and sleepless. At the time of the accident he was operating a garage earning about $25. per week clear of the shop expense. He testified he was prevented from working for three or four weeks. The accident occured March 22, 1936, and plaintiff testified that the injuries and the resulting conditions that followed made it impossible for him to give all his time to his shop and that in September following the accident he disposed of it. After that time he was employed as a mechanic for a transport company with a salary of $120. per month. Later it being increased to $125. per month. The attending physician's claim was $25. In view of the injuries proven and loss of time

we are satisfied the damages awarded are supported by the evidence.

The testimony of Dr. McFadden as an expert was confined entirely to the plaintiff's nervous system which was claimed to have been disturbed by reason of the injury. But in view of the fact that there is no dispute that the plaintiff was injured or as to the manner in which the injury was received and the only purpose of Dr. McFadden's testimony was to show the existence of certain physical conditions claimed to have been the result of the injury, the erroneous rulings on the admission of his evidence in permitting him to include as a basis of his opinion certain improper elements could not have prejudiced the defendant since the amount of the verdict is amply supported by other uncontradicted testimony.

Defendant urges that the court erred in refusing to give its instruction No. 1. The substance of this instruction was covered by defendant's given instructions numbered one and four. The second refused instruction told the jury that if they believed from the evidence that the iron pipe in question was made insecure by the act of a person unknown to the defendant not in his employ without his knowledge or consent and that the defendant had no knowledge or notice of such act and the insecure condition of the pipe then they should find the defendant not guilty. If the pipe was made insecure by the act of a person not in defendant's employ then the only evidence to which the instruction would have been applicable was that of the assistant manager who testified in reference to people hanging onto the curtain attached to the rod. Notice of such act to the assistant manager was notice to the defendant and therefore the instruction was objectionable upon that basis, furthermore the court in Hart vs. Washington Park Club 157 Ill. 9 quoted with approval from Currier vs. Boston Music Hall 135 Mass. 414 as follows, "In Currier vs. Boston Music Hall, 135 Mass. 414, it was held that

the proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation; and if he neglects his duty in this respect, so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial."

Finding no reversible error in the record the judgment is affirmed.

Judgment Affirmed.

Illinois appellate opinion

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